S. HRG. 103-138

THE FREEDOM OF ACCESS TO CLINIC ENTRANCES ACT OF 1993

HEARING

BEFORE THE

COMMITTEE ON LABOR AND HUMAN RESOURCES UNITED STATES SENATE

ONE HUNDRED THIRD CONGRESS

FIRST SESSION

ON

S. 636

TO AMEND THE PUBLIC HEALTH SERVICE ACT TO PERMIT INDIVIDUALS TO HAVE FREEDOM OF ACCESS TO CERTAIN MEDICAL CLINICS AND FACILITIES, AND FOR OTHER PURPOSES

MAY 12, 1993

Printed for the use of the Committee on Labor and Human Resources

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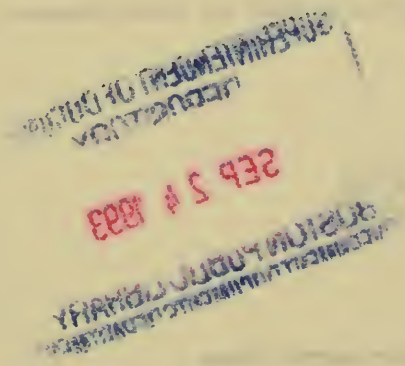

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MAY 12, 1993

ADDITIONAL MATERIAL

THE FREEDOM OF ACCESS TO CLINIC ENTRANCES ACT OF 1993

WEDNESDAY, MAY 12, 1993

U.S. SENATE,
COMMITTEE ON LABOR AND HUMAN RESOURCES,
Washington, DC.

The committee met, pursuant to notice, at 10 a.m., in room SD–430, Dirksen Senate Office Building, Senator Edward M. Kennedy (chairman of the committee) presiding.

Present: Senators Kennedy, Pell, Metzenbaum, Simon, Mikulski, Wellstone, Kassebaum, Coats, and Gregg.

OPENING STATEMENT OF SENATOR KENNEDY

The CHAIRMAN. We will come to order.

Our hearing this morning deals with the serious problem of access to medical clinics providing reproductive health services, including abortions. Across the country, antiabortion violence and intimidation are on the rise. Clinics are assaulted with human blockades and invasions. They are bombed, vandalized, sometimes burned to the ground. The doctors and staff who work there and their families are assaulted and threatened.

In Pensacola, FL, this past March, one of those physicians, Dr. David Gunn, was shot and killed. His death was a national tragedy, and the act of violence that took his life was a national outrage.

Every woman in America has a constitutional right to decide for herself whether to terminate her pregnancy, and that fundamental right deserves the full protection of Federal, State, and local law. Unfortunately, State and local authorities cannot do the job alone. A nationwide campaign targets local clinics. Large blockades overwhelm local police and prosecutors. No single State, much less an individual city or town, can keep up with those who travel from State to State to wage this campaign of violence.

The legislation before us today, the Freedom of Access to Clinic Entrances Act of 1993, is designed to prevent this conduct and punish it when it occurs. It will establish new Federal criminal offenses for violent acts and threats of force aimed at abortion providers and for physical obstruction and destruction of clinics. It will give victims of these tactics a private right of action. And it will authorize the Attorney General to seek damages on behalf of victims, injunctions against offensive conduct, and stiff fines against the perpetrators.

Today, we will hear from a number of distinguished witnesses, including the Attorney General Janet Reno. Abortion providers will describe the tactics used against them. Local officials will explain the need for Federal help, and Professor Larry Tribe of the Harvard Law School will address the constitutional issues. I look forward to their testimony.

We will now receive a statement for the record by Senator Harkin.

[The prepared statement of Senator Harkin follows:]

PREPARED STATEMENT OF SENATOR HARKIN

Mr. Chairman, I am pleased that we are holding this hearing on the Freedom of Access to Clinic Entrances Act. It is time for Congress to take action to protect the right to choose, not only against those who would deny that right by restrictive laws, but also against those who use blockades, threats, and violence to deny that right to women.

Like many Americans, I was shocked by the assassination of Dr. David Gunn by antiabortion extremists in Pensacola, FL. Although the murder in Pensacola, FL was the first death related to anticlinic activities, it is only an escalation of the level of violence by radical antichoice groups.

Clinics and clinic workers nationwide have had to endure blockades, picketing of both their homes and their workplaces, bomb threats and bombings, vandalism, and physical violence. Groups opposing the right to choose have coordinated these attacks across State lines.

Because of my concern with this pattern of harassment, I led an effort with 16 of my Senate colleagues in calling for an investigation of these activities by the Federal Bureau of Investigation on March 18, 1993. On April 9, Director William Sessions responded to our letter.

Director Sessions stated that "the Department of Justice concluded that current Federal criminal laws are not adequate to address the issues of denial of access and related violence at abortion facilities." Therefore, the FBI is precluded from undertaking the kind of comprehensive investigation demanded by this pattern of abuse and violence.

Mr. Chairman, the FBI is telling us that its hands are tied in taking positive action to investigate anticlinic violence. This is the best argument possible for passage of the bill we are considering today. I believe we have a responsibility to enact laws that defend the rights of Americans. That includes the fundamental right to privacy, and the right to choose. This Congress should not stand idly by, while a determined, extreme minority uses intimidation, violence and harassment to impose their will on women. I strongly support this legislation, and call for its passage. I ask that the letter to Director Sessions, and his reply, be printed in the record following my statement.

United States Senate
WASHINGTON, DC 20510

March 18, 1993

William Sessions, Director
Federal Bureau of Investigation
J. Edgar Hoover FBI Building
Tenth and Pennsylvania Ave. NW
Washington, D.C. 20535

Dear Director Sessions:

The recent murder of Dr. David Gunn in Pensacola, Florida, allegedly by an anti-abortion extremist, has driven home to many Americans the rising tide of anti-clinic violence across the country. Organized groups coordinate anti-abortion activity across state lines. Many clinics and clinic workers nationwide have had to endure blockades, picketing of both their work sites and their homes, bomb threats and bombings, vandalism, and physical violence.

This letter is to request that the Federal Bureau of Investigation immediately begin an investigation of this pattern of harassment. Health care workers should have the right to know that they are not subjecting themselves or their families to threats, harassment or violence in the practice of their profession. These actions are clearly intended to prevent women from exercising their Constitutional right to a safe, legal abortion. A full investigation of violence and harassment against clinics and clinic workers is essential to addressing this growing national problem.

We appreciate your attention to this matter.

Sincerely,

Tom Harkin

Edward M. Kennedy

Howard M. Metzenbaum

Dianne Feinstein

John F. Kerry

Charles S. Robb

Barbara A. Mikulski

Bob Packwood

Russell D. Feingold

Ben Nighthorse Campbell

Frank R. Lautenberg

Paul Simon

Carl Levin

John D. Rockefeller IV

Herb Kohl

Patty Murray

Carol Moseley-Braun

U.S. Department of Justice

Federal Bureau of Investigation

Office of the Director

Washington, D.C. 20535

April 9, 1993

Honorable Tom Harkin
United States Senate
Washington, D.C.

Dear Senator Harkin:

I am writing in response to your March 18th letter in which you and several of your colleagues relay concerns regarding the recent murder of Dr. David Gunn in Pensacola, Florida and the violent attacks on medical facilities at which abortions are performed. The Department of Justice previously took the position that there was no Federal criminal jurisdiction applicable to those incidents. As a result, the Federal Bureau of Investigation has not conducted investigations regarding them. I delayed this response until Attorney General Reno had the opportunity to review this situation.

Almost immediately after assuming office, Attorney General Reno requested an examination of existing Federal statutes by attorneys at the Department of Justice to determine if a Federal law enforcement response is authorized under current Federal law. The Department of Justice concluded that current Federal criminal laws are not adequate to address the issues of denial of access and related violence at abortion facilities. The Attorney General has advised Congress that she will work with the Congress in an effort to draft legislation which will adequately address these issues while respecting the right of expression enshrined in the First Amendment.

Current FBI policy recognizes primary jurisdiction for these incidents rests with state authorities through their local law enforcement agencies. This is based on the previous guidance from the Department of Justice. The FBI has always supported state and local law enforcement agencies through access to the FBI Laboratory and other resources and will continue to do so. If and when legislation is enacted which established Federal criminal jurisdiction, we will investigate these acts as violations of the newly enacted Federal criminal statute. Until that time, our involvement will remain in a supportive capacity to local law enforcement conducting investigations using pertinent state statutes.

I understand your concerns in this matter and hope the information I provided will be of some assistance to you and the other members of the Senate who share these same concerns.

Sincerely yours,

William S. Sessions
Director

The CHAIRMAN. Senator Coats.
Senator COATS. I have no statement, Mr. Chairman.
The CHAIRMAN. Senator Mikulski.

OPENING STATEMENT OF SENATOR MIKULSKI

Senator MIKULSKI. Thank you very much, Mr. Chairman.

I wish to welcome the Attorney General of the United States for this most important testimony today and to all others who will testify about the need for the Freedom of Access to Clinic Entrances Act.

What we see every day is that terrorism, harassment, vandalism, and violence are taking place in the very place where people come to seek medical treatment and medical advice, and this violence has absolutely no place in our society.

While we are fast at work to remove the barriers to health care for millions of Americans, we cannot tolerate those who, by their extremism, put new barriers in the way of women seeking reproductive health services. Terrorism against women, violence against clinics, and criminal acts like the murder of Dr. Gunn must absolutely be stopped.

We see this every day not only in Florida, but in my own State. Doctors receive threatening phone calls and hate mail. Now we are even told that one doctor, or doctors in the Pasadena, MD area, are now wearing bullet-proof vests as they go to work carrying their medical kit, donning their stethoscope, to be able to give the services that they deliver. Maryland responded, Mr. Chairman, with its own legislation to deal with the clinic attacks and to pass a clinic violence and harassment prevention strategy.

Mr. Chairman, I know that we want to hear from the Attorney General, but we have heard from the women. We have heard from those physicians and nurse practitioners who want to get out there and do their job.

I respect people who have differing views. I respect people who have different religious views, but we cannot under the name of God allow people to be either killed or harassed. And there are others who have differing views about medical treatment because of religious exemptions, but they don't go to the streets and do violence. I have never seen anyone who practices the Christian Science tradition block an entrance room to an emergency room at a hospital in Baltimore or block the access of going to give blood at a Red Cross, and we know that in our society we can tolerate religious difference, but we should never block the barriers to providing health care.

I look forward to the Attorney General's ideas and moving this legislation.

The CHAIRMAN. Senator Pell.

OPENING STATEMENT OF SENATOR PELL

Senator PELL. Thank you, Mr. Chairman.

I am very pleased, indeed, to be here to greet Attorney General Reno. I have not met her before. I look forward to working with her over the coming years. I know, too, that your first days on the job

have certainly been difficult ones. I wish that your courage, manner, and leadership will resolve the problems that you face.

But I particularly wanted to welcome the medical director of Rhode Island's Planned Parenthood, Dr. Pablo Rodriguez, who is an Assistant Clinical Professor of Obstetrics and Gynecology at Brown University Medical School.

When you hear Dr. Rodriguez' testimony, Mr. Chairman, I think you will understand the courage he has shown in being here to testify and just in going about his daily life, routine for most of us; in his case, waving the red flag of courage. We all appreciate Dr. Rodriguez being here and thank him for his willingness to speak for so many of our colleagues across the country.

Thank you, Mr. Chairman, for this opportunity to speak. I ask the balance of my statement be inserted in the record as if read.

The CHAIRMAN. It will be included in the record as if read.

[The prepared statement of Senator Pell follows:]

PREPARED STATEMENT OF SENATOR PELL

Mr. Chairman, I appreciate your holding a hearing on this important matter. I am very pleased that Attorney General Reno is here to testify about the administration's view on the bill before us today, S. 636, the Freedom of Access to Clinic Entrances Act.

This is the first time that I have had the pleasure of meeting Attorney General Reno and I must say that I think she is handling her many responsibilities admirably. I know, Attorney General Reno, that your first days on the job have not been easy ones, but want you to know that I admire your forthcoming manner, your courage, and your leadership, and I look forward to working with you.

Mr. Chairman, I would also like to take this opportunity to welcome Dr. Pablo Rodriguez, who is medical director of Rhode Island Planned Parenthood and an assistant clinical professor of Obstetrics and Gynecology at Brown University Medical School. When you hear Dr. Rodriguez's testimony, Mr. Chairman, I think you will understand the great courage he has shown both in coming here today to testify, and in going about his daily life and work at home in Rhode Island. We all appreciate your being here today, Dr. Rodriguez, and thank you for your willingness to speak so candidly for so many of your colleagues across the country.

Mr. Chairman, there are many Senators and witnesses here today and I will not make a lengthy opening statement. I do want to make one very simple point.

Let us remember that this hearing is about crime. Certain individuals across the country, and I regret to say, in my own State of Rhode Island, have decided that they have the right not simply to protest, which is of course a constitutionally protected right, but to inflict fear, violence, and pain on others, and to destroy property. This is not only unacceptable behavior; it is, in my view, a form of terrorism.

Mr. Chairman, I respect the varying views in my own State and across the Nation on abortion. And I know well the strongly held views on first amendment rights that we, as a nation, hold dear. But I believe firmly that crime cannot masquerade as free speech or free expression, and I believe that people have a right to live

their lives free of the fear, intimidation and violence that has resulted in death, arson, stalking, and other heinous crimes against consumers and providers of many medical clinics.

I have cosponsored the bill before us because I believe it draws a fair, reasonable and constitutional line between the right of protesters to protest, and the right of women to obtain an abortion and of physicians to perform them. I regret that this hearing is necessary, but I want Dr. Rodriguez and others like him to know that we will not sit back and do nothing while they fear for their lives.

Thank you, Mr. Chairman.

The CHAIRMAN. We welcome very much the Attorney General of the United States. She has already demonstrated her own strong outrage at the violence that has taken place at the abortion clinics and has committed the full resources of the Justice Department to deal with this issue, and she comes here today to help give us the position of the President and the Justice Department on this extremely important and fundamental issue.

We welcome very much your presence here. We are glad to have you.

STATEMENT OF THE HONORABLE JANET RENO, ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC

Attorney General RENO. Mr. Chairman and members of the committee, I greatly appreciate the opportunity to be here with you today to support Senate bill 636, the Freedom of Access to Clinic Entrances Act of 1993. Enactment of this bill is crucial to ensuring that women have an unobstructed opportunity to choose whether or not to have an abortion. In addition to this oral statement, I have submitted a written statement for the record.

This subject has been of special importance to me. At the time of my confirmation, Dr. David Gunn had just been killed for his work in providing abortion services in Florida. I promised the members of that committee that if I were confirmed as Attorney General, I would undertake a review of Federal law to determine what could be done in this area.

Immediately upon assuming office, I directed attorneys in the Civil Rights Division and in the Criminal Division of the Department of Justice to examine existing law and report back to me. They did so, and their unanimous judgment was that existing Federal laws, while perhaps applicable in some instances, were inadequate.

I thereupon instructed them to cooperate closely with Members of Congress to assist in crafting the best possible legislation to remedy this deficiency. I emphasized that the legislation must secure the rights of women seeking reproductive health services and the individuals who provide those services, while respecting the first amendment rights of those who oppose abortion to express that opposition in meaningful ways. I also stated that passage of this legislation would be one of the Department's top priorities. I remain firm in that commitment.

I am very pleased today to report my strong endorsement of Senate bill 636, which achieves the goals I set for abortion clinic legislation. The Department of Justice is convinced that Senate bill 636 is constitutional and, with minor changes, will effectively ensure

women access to abortion without suppressing the legitimate activities of those who oppose abortion.

Some have asked whether there is a need for Federal legislation. My unequivocal answer is yes. A woman's right to choose whether to terminate a pregnancy is fundamental. While a substantial majority of Americans support that right, a deeply sincere minority opposes abortion. The right of individuals in that minority to express their views must be respected.

In recent years, however, some antiabortion activists have increased the intensity of their activities from picketing to physical blockades, sabotage of facilities, stalking and harassing abortion providers, arson, bombings, and, finally, culminating in the murder of Dr. Gunn. In the process, they have succeeded in shutting down abortion clinics, delaying access to time-sensitive health care, and otherwise making it impossible for women to exercise their right to choose.

This is a problem that is national in scope. It is occurring throughout the country; on the doorstep of the Nation's Capital; in Alexandria and Falls Church in northern Virginia; in Pensacola and Melbourne in Florida; in West Hartford, CT; in Wichita, KS; in Fargo, ND, and Dallas, TX, just to name a few of the more visible incidents. Moreover, much of the activity has been orchestrated by groups functioning on a nationwide scale. Because of this nationwide scope, the problem transcends the ability of any single local jurisdiction to address it.

The problem also exceeds the capabilities of local law enforcement on occasions in other ways. Groups such as Operation Rescue have been able to marshal sufficient participants trained in tactics designed to obstruct law enforcement that they have overwhelmed the resources of local law enforcement.

A prime example is the assault on two clinics in Wichita, KS, in the summer of 1991 by Operation Rescue. Large numbers of activists converged on Wichita and physically blockaded the clinics. When police moved in to arrest them, they moved in baby steps and, when arrested, frequently refused to identify themselves to local law enforcement officials. The clinics were closed for a week and were reopened only as a result of an injunction entered by the Federal district court which enabled Federal marshals to move in. The district court found that Operation Rescue had purposefully overwhelmed the resources of the city's relatively small police forces to respond effectively. This situation has been repeated in other jurisdictions.

Frustrated by the inability of local law enforcement to protect their rights, abortion providers and patients have turned to Federal law for assistance. Numerous cases have been reported in Federal district courts filed by abortion providers seeking to enjoin interference with their activities pursuant to 42 U.S.C. 1985(3). Many of these cases also allege violations of State law, but the focus has been on Section 1985(3), a Reconstruction era civil rights law.

In *Bray* v. *Alexandria Women's Health Clinic,* 113 S. Ct. 753 (1993), the U.S. Supreme Court addressed the relevance of this statute to blockades of abortion clinics and severely restricted its applicability. The Court concluded that Operation Rescue activities in that case had not disfavored women by reason of their sex, as

required by 1985(3), but had been motivated by a desire to prevent abortions.

The Court refused to equate hostility to abortion with hostility to women. The Court also held that the right to abortion, which falls under the 14th Amendment, is protected by the Constitution only against State and not private infringement. The only right protected by the Constitution against private infringement that was alleged in the case was the right to travel interstate. The Court held that the Operation Rescue had not acted with the conscious aim of interfering with that right.

Bray severely curtailed the effectiveness of Section 1985(3) as a remedy for abortion clinic blockades, and the restrictions placed by the Court on that statute warrant a congressional response. I hasten to add, however, that the Department does not view Bray as having eliminated Section 1985(3) as a tool for addressing the activities of antiabortion activities.

We recently filed a brief as amicus curiae in the tenth circuit in the Wichita clinic case, opposing Operation Rescue's request that the Court summarily vacate the preliminary injunction, and ordered the case dismissed in light of Bray. Our brief argues that factual differences between this case and Bray are sufficient to preclude summary dismissal and that the meaning of the hindrance clause of Section 1985(3), which the U.S. Supreme Court declined to consider in Bray, remains unsettled and should be addressed.

Therefore, while we do not review Section 1985(3) as irrelevant to protection against interference with abortion rights, it is not an adequate solution. Nor have we been able to identify any other Federal law that would be generally applicable to private interference with a woman's right to choose.

We therefore have concluded that existing Federal law is inadequate, and new Federal authority is needed to address all of the dimensions of the problem. Senate bill 636 would do that by creating a comprehensive response that would authorize civil and criminal penalties for interference with access to abortion services, regardless of whether that interference occurred at the site of a clinic as part of a large-scale action or involved sabotage in the middle of the night or involved an attack on an abortion provider in her or his home or car.

In sum, Federal legislation is necessary because the problem is national in scope, local law enforcement has been unable to deal effectively with it, and existing Federal law is inadequate to provide a complete response.

Congress has clear authority to enact Senate bill 636 pursuant to Article I, Section 8, Clause 3 of the Constitution, which gives it authority to regulate interstate commerce. That authority is broad, and an exercise of it will be sustained if Congress has a rational basis for finding that an activity affects interstate commerce and acts rationally in addressing the activity.

Senate bill 636 falls easily within the commerce power. Just as Congress had authority in the Civil Rights Act of 1964 to prohibit racial discrimination in public accommodations because it artificially restricted economic activity and on the same basis to make criminal racially motivated assaults that interfere with federally protected rights in the Civil Rights Act of 1968, it has authority to

prohibit interference with individuals seeking to obtain or provide abortion services.

The provision of abortion services undoubtedly affects commerce. The entities that provide these services, including clinics, physicians' offices, and hospitals, purchase or lease facilities, purchase and sell equipment, goods, and services, employ people and generate income.

Moreover, it is well-established that many serve significant numbers of patients from other States. In Wichita, for example, 44 percent of the patients at one clinic came from out-of-State. Thus, there can be little doubt that abortion providers are engaged in interstate commerce, and Congress should not have difficulty developing a legislative record that supports such a finding.

In addition, it is equally clear that the types of activities that would be prohibited by Senate bill 636 have a negative impact on interstate commerce. As the committee will hear, clinics have been closed because of blockades and sabotage and have been unable to provide services. Abortion providers have been harassed and frightened into ceasing to perform abortions. Congress therefore should have no difficulty in supporting a conclusion that the conduct prohibited by Senate bill 636 results in the provision of fewer abortions and unnecessarily constricts the interstate movement of people and goods.

Our review of Senate bill 636 convinces us that it does not suppress expression in violation of the first amendment. Rather, the bill is a facially valid prohibition of harmful conduct. The bill proscribes four specific types of conduct: (1) the use of force; (2) threats of force; (3) physical obstruction to injure, intimidate, or interfere with an individual seeking access to abortion services; and (4) destruction of the property of medical facilities. The purpose of the legislation is to protect the right of access to abortion services and to ensure that interstate commerce is not impeded. The bill plainly is not intended to suppress a particular message and, indeed, allows ample room for expression of opinion through regular peaceful means.

Of course, conduct can express a message and is frequently entitled to first amendment protection, but the U.S. Supreme Court has stated that Government generally has more latitude in restricting expressive conduct than it has in restricting speech. Therefore, the Court has concluded that a sufficiently important governmental interest in regulating conduct can justify incidental limitations on first amendment freedoms. Indeed, this reasoning is compelled by the fact that it is possible to find some element of expression in nearly any conduct, regardless of how harmful the conduct may be to individuals or society. That possibility does not mean that Government may not act. Rather, it means that Government must have a sufficiently important reason for doing so, and it must not target conduct on the basis of its expressive content.

The Government interest in suppression of the use of force, threats of force, physical obstruction, and destruction of property supply a sufficient Government interest, particularly when coupled with the need to do so to preserve the right of a woman to choose to have an abortion. And like other civil rights laws that prohibit conduct taken because of the race of the victim, conduct that often

expresses a message, Senate bill 636 regulates conduct not because of the message it conveys, but because of the harm it inflicts on victims by depriving them of fundamental rights.

Senate bill 636 is narrowly tailored to accomplish its legitimate goal. Through the limitations imposed by the intent requirement and the specifically described conduct that is prohibited, Senate bill 636 avoids unnecessary restriction of expressive conduct. Nor is it vague. Men and women of common intelligence will have little difficulty discerning what conduct it prohibits. Certainly, proscriptions on the use of force, threats of force, physical obstruction, and destruction of property are sufficiently clear and well-known in the law that they will not cause confusion.

Finally, I want to highlight a few of the features of Senate bill 636 that I find particularly important. First, the definition of "prohibited activities," with the minor change that I have suggested in my written statement, does a very good job of addressing the problem without unnecessarily restricting antiabortion activities.

The inclusion of both civil and criminal penalties is very important. The civil remedies of injunctions and damages are appropriate as a means of addressing massive blockades. Courts can fashion injunctive relief that will keep clinics operating, yet allow room for the legitimate expression of opinion by demonstrators. Damages are important to compensate those individuals who, seeking to exercise their rights, suffer real harm, whether physical or psychological. And the authorization of statutory damages is appropriate to encourage victims to pursue violations and as a deterrent to violators.

I also think it is very important that the Attorney General have authority to file a civil action. This approach follows the model of other statutes protecting individual rights—notably, the Fair Housing Act—by shifting the burden of civil enforcement from private victims to the Government, which is often better able to pursue such cases and vindicate the enormous interest that our society has in protecting individual rights.

The authorization of criminal penalties is essential. Some opponents of the right to choose have escalated the level of their opposition in recent years to violent interference. They have demonstrated a willingness to break the law and to defy court injunctions. Unfortunately, criminal sanctions, including imprisonment, appear necessary to deter and punish unlawful conduct, as well as simply to incapacitate some of the more willful and persistent violators. In this regard, I think the elevated terms of punishment for repeat offenders and those who cause bodily injury or death are justified and necessary.

In conclusion, I thank you, Mr. Chairman, for producing such an important and thoughtful bill. I urge this committee to consider the few changes that I have suggested in my written statement and then to move expeditiously toward enactment of this essential piece of legislation.

I would be pleased to answer your questions, Mr. Chairman.

The CHAIRMAN. Thank you very much, Attorney General, for a very comprehensive comment, and we will include your full statement in the record.

[The prepared statement of Attorney General Reno follows:]

PREPARED STATEMENT OF ATTORNEY GENERAL JANET RENO

Mr. Chairman and members of the Committee, it is a distinct privilege to appear before you regarding the very important matter of ensuring that women have an unobstructed opportunity to choose whether or not to have an abortion. When I appeared before the Senate Judiciary Committee as the President's nominee for the office of Attorney General, this subject was very much on my mind because of the tragic killing of Dr. David Gunn outside of a clinic in Pensacola in my home State. I promised the members of the Judiciary Committee that, if I were confirmed as Attorney General, I would undertake a review of existing federal law to determine what could be done in this area.

Immediately upon assuming office, I directed attorneys in the Civil Rights Division and the Criminal Division of the Department of Justice to examine existing law and report back to me. They did so and their unanimous judgment was that existing federal laws, while perhaps applicable in some instances, were inadequate. I, thereupon, instructed them to cooperate closely with members of Congress to assist in crafting the best possible legislation to remedy this deficiency. I emphasized that the legislation must secure the rights of women seeking reproductive health services and the individuals who provide those services, while respecting the First Amendment rights of those who oppose abortion to express that opposition in meaningful ways. I also stated that passage of this legislation would be one of the Department's top priorities. I remain firm in that commitment.

Shortly after our staffs met for the first time, Chairman Kennedy introduced S. 636. I am very pleased to report my strong endorsement of this legislation. Our staffs have met subsequently to discuss fine-tuning of the bill and I am told that the spirit of those meetings has been extremely cooperative and productive. The Department is convinced that S. 636 is constitutional and, with minor changes, will effectively ensure women access to abortion without suppressing the legitimate activities of those who oppose abortion.

S. 636 is modeled closely on 18 U.S.C. 245, which prohibits the use of force or threat of force to interfere with an individual's exercise of certain federally protected rights because of the victim's race, color, religion, or national origin. The comparable core of Section 3 of S. 636 would prohibit the use of force or threat of force to interfere intentionally with a person because she was "obtaining abortion services" or "lawfully aiding another person to obtain abortion services." It would also prohibit an individual from intentionally damaging or destroying the property of a medical facility because the facility provides abortion services. In our view, with one minor change, this section very effectively addresses the problem that brings us here today. Although we gather that the phrase "lawfully aiding another person to obtain abortion services" is intended to protect abortion providers, as well as others, we think that purpose would be accomplished more directly by simply adding the phrase "or providing" after "obtaining". The section would then prohibit interference with someone who was "obtaining or providing abortion services." The remainder of the section should be preserved intact.

NEED FOR FEDERAL LEGISLATION

A woman's right to choose whether to terminate a pregnancy is a fundamental right protected by the Constitution. While polls suggest that a substantial majority of Americans support that right, a deeply sincere minority opposes abortion. The right of individuals in that minority to express their views must be respected. The freedom that our society affords individuals to express even the most unpopular opinions is the bedrock upon which our democracy rests and makes us virtually unique. Peaceful anti-abortion protesters fit within this tradition. In recent years, however, anti-abortion activists have increased the intensity of their activities from picketing to physical blockades, sabotage of facilities, stalking and harassing abortion providers, arson, bombings, and finally culminating in the murder of Dr. Gunn. In the process, they have succeeded in shutting down abortion clinics and otherwise making it impossible for women to exercise their right to choose.

This committee will hear far more eloquent testimony from the patients and health care providers who have been the victims of these activities than I could hope to provide. These witnesses can tell you of threats to their lives and the safety of their families, harassment in their homes and communities, massive obstruction and occupation of their workplaces, extensive property damage, and the tragedy of being denied access to scarce and time sensitive health care.

A. Scope of the problem

This is a problem that is national in scope. It is occurring throughout the country; on the doorstep of the Nation's capital in Alexandria and Falls Church in Northern

Virginia; in Pensacola and Melbourne in Florida; in West Hartford, CT; in Wichita, KS; in Fargo, ND; and in Dallas, TX, just to name a few of the more visible incidents. Moreover, much of the activity has been orchestrated by groups functioning on a nationwide scale, including, but not limited to, Operation Rescue, whose members and leadership have been involved in litigation in numerous areas of the country.[1] Because of this nationwide scope, the problem transcends the ability of any single local jurisdiction to address it.

The problem also exceeds the capabilities of local law enforcement in another way. Groups such as Operation Rescue have been able to marshal sufficient participants trained in tactics designed to obstruct law enforcement that they have overwhelmed the resources of local law enforcement, which has been unable even to keep clinics open. A prime example is the assault on two clinics in Wichita, KS, in the summer of 1991 by Operation Rescue. Large numbers of activists converged on Wichita and physically blockaded the clinics. When police moved in to arrest them, they moved in baby steps and, when arrested, frequently refused to identify themselves to law enforcement officials. The clinics were closed for a week and were reopened only as a result of an injunction entered by the federal district court, which enabled Federal marshals to move in. The district court found "that Operation Rescue * * * purposefully acted to interfere with the ability of the local law enforcement authorities to protect the rights of the plaintiffs and their patients." Women's Health Care Services v. Operation Rescue, 773 F. Supp. 258, 265 (D. Kan. 1991). The court concluded that "[b]y targeting Wichita as the focus of its national efforts, Operation Rescue has virtually overwhelmed the resources of the city's relatively small police forces to respond with dispatch and effectiveness." Id. at 265–66. This situation has been repeated in other jurisdictions. See, e.g., Pro-Choice Network v. Project Rescue, 799 F. Supp. 1417 (W.D.N.Y. 1992); NOW v. Operation Rescue, 726 F. Supp. 1483 (E.D. Va. 1989), aff'd, 914 F.2d 582 (4th Cir. 1990), rev'd in part and vacated in part sub nom. Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753 (1993).

The Wichita court also found that "significant questions exist as to the lack of zeal displayed by the City of Wichita in defending the legal rights of the plaintiffs and their patients." Ibid. The reluctance of local authorities to protect the rights of individuals provides a powerful justification for the enactment of Federal protections that has been invoked previously by Congress in passing laws to protect civil rights.

B. The inadequacy of existing federal law

Frustrated by the inability of local law enforcement to protect their rights, abortion providers and patients have turned to Federal law for assistance. Numerous cases have been reported in Federal district courts filed by abortion providers seeking to enjoin interference with their activities pursuant to 42 U.S.C. 1985(3). Many of these cases also allege violations of state law, but the focus has been on Section 1985(3), a Reconstruction era civil rights law. That statute has two relevant provisions. The first prohibits conspiracies "for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws'." Most of the abortion-related Section 1985(3) litigation emphasized this clause.

In Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753 (1993) the Supreme Court addressed the applicability of this clause to blockades of abortion clinics. The Court bad previously held that a conspiracy among private individuals would violate this provision only if (1) some racial, or perhaps other class-based, invidiously discriminatory animus underlay the conspiracy, see Griffin v. Breckenridge, 403 U.S. 88, 102 (1971); and (2) the conspiracy was aimed at interfering with rights protected against private infringement. See Carpenters v. Scott, 463 U.S. 825, 833 (1983). The Court assumed, without deciding, that animus based on gender would be reached by Section 1985(3), but it concluded that Operation Rescue activists in that case had not disfavored women by reason of their sex, but bad been motivated by a desire to prevent abortions. The Court refused to equate hostility to abortion with hostility to women. The Court also held that the right to abortion, which falls under the Fourteenth Amendment, is protected by the Constitution only against state—and not private—infringement. The only right protected by the Constitution against pri-

[1] See, e.g., Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753 (1993); Town of West Hartford v. Operation Rescue, No. 92–7595 (2d Cir. Apr. 21, 1993); New York State NOW v. Terry, 704 F. Supp. 1247 (S.D.N.Y.), aff'd as modified, 886 F.2d 1339 (2d Cir. 1989), cert. denied, 495 U.S. 948 (1990); Southwestern Medical Clinics of Nevada v. Operation Rescue, 744 F. Supp. 230 (D. Nev. 1989); NOW v. Operation Rescue, 726 F. Supp. 300 (O.D.C. 1989); Women's Health Care Services v. Operation Rescue—National, 773 F. Supp. 258 (D. Kan. 1991); Lucero v. Operation Rescue of Birmingham, 954 F.2d 624 (11th Cir. 1992); Volunteer Medical Clinic. Inc. v. Operation Rescue, 948 F.2d 218 (6th Cir. 1991); Town of Brookline v. Operation Rescue, 762 F. Supp. 1521 (D. Mass. 1991); National Abortion Federation v. Operation Rescue, 721 F. Supp. 1168 (C.D. Cal 1989).

vate infringement that was alleged in the case was the right to travel interstate. The Court held that Operation Rescue had not acted with the conscious aim of interfering with that right. It also noted that, in any event, the right was violated only by the erection of actual barriers to interstate movement or the discriminatory treatment of interstate travelers. The Court concluded that the barriers erected at abortion clinics only impeded movement from one part of Virginia to another and that there had been no effort to discriminate between interstate and intrastate travelers.

The Court, by a vote of five to four, declined to consider whether there had been a violation of the second clause of Section 1985(3), commonly referred to as the "hindrance clause," which prohibits conspiracies with "the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws." Although the majority expressed some concerns about the applicability of the hindrance clause to the allegations in the case, four Justices would have read the clause to provide a cause of action for the abortion clinics.

Bray doubtless limited the effectiveness of Section 1985(3) as a remedy for abortion clinic blockades and the restrictions placed by the Court on that statute warrant a congressional response. I hasten to add, however, that the Department does not view Bray as having eliminated Section 1985(3) as a tool for addressing the activities of anti-abortion activists. We recently filed a brief as amicus curiae in the Tenth Circuit in Women's Health Care Services v. Operation Rescue National, No. 91–3250, the Wichita clinic case, opposing Operation Rescue's request that the court summarily vacate the preliminary injunction and order the case dismissed in light of Bray. Our brief, which has been made available to the committee, argues that factual differences between this case and Bray are sufficient to preclude summary dismissal regarding the first clause of Section 1985(3) and that the meaning of the "hindrance clause" of Section 1985(3) remains unsettled and should be addressed prior to dismissal.

Therefore, while we do not view Section 1985(3) as irrelevant to this problem, it is not adequate. The first clause can only be applied where unusual facts exist. The applicability of the second clause remains an unsettled question of law, but at the very most, it will only provide a cause of action where demonstrators have so overwhelmed local authorities as to prevent them from providing the equal protection of the laws. Thus, at most, the clause will be limited to those situations involving massive blockades of clinics and will not address other acts of violence or sabotage or the whole range of activities that occur away from clinics, but are designed to prevent individuals from obtaining abortion services. We have been unable to identify any other Federal law that would be generally applicable to private interference with a woman's right to choose. Section 241 of Title 18 protects against private conspiracies only to the extent that the conspiracies interfere with Federal rights protected against private interference. The right to abortion has not been recognized as such a right. Section 242 of Title 18 does not extend to conduct by private actors, but rather requires a showing that the offensive conduct occurred "under color of law." Section 245(b)(1)(E) of Title 18 prohibits the use of force or threat of force to interfere with an individual's participation in a program or activity receiving Federal financial assistance. Because Federal funds may not be used for abortion services, clinics do not receive Federal financial assistance for those services. Section 245(b)(3) prohibits interference with a business engaged in interstate commerce during times of "riot" or "civil disorder." The statute does not define those terms and it would be a difficult burden to prove the existence of those conditions.

Finally, in his concurring opinion in Bray, Justice Kennedy suggested that 42 U.S.C. 10501 could be used in circumstances such as those in Bray. That statute authorizes the Attorney General to provide law enforcement assistance if a State submits an application and the assistance "is necessary to provide an adequate response to a law enforcement emergency." The assistance that can be provided is limited to "funds, equipment, training, intelligence information, and personnel." Because a state must initiate this process and because the conditions for granting assistance are stringent, this statute does not provide a significant response.

We, therefore, have concluded that existing Federal law is inadequate to address this problem. Although some statutes may provide limited relief in specific circumstances, new Federal authority is needed to address all of the parameters of the problem. S. 636 would do that by creating a comprehensive response that would create civil and criminal penalties for interference with access to abortion services, regardless whether that interference occurred at the site of a clinic as part of a large-scale action, or involved sabotage in the middle of the night, or involved an attack on an abortion provider in her home or car.

In sum, Federal legislation is necessary. The problem is national in scope, local law enforcement has been unable to deal effectively with it, and existing Federal law is inadequate to provide a complete response.

CONGRESSIONAL AUTHORITY TO ENACT S. 636

A. The commerce clause

Congress has authority to enact S. 636 pursuant to Article I, section 8, clause 3 of the Constitution, which gives it authority to regulate interstate commerce. That authority is broad and an exercise of it will be sustained if Congress has a rational basis for finding that an activity affects interstate commerce and acts rationally in addressing the activity. See Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 276 (1981); Presault v. ICC, 494 U.S. 1, 17 (1990); Katzenbach v. McClung, 379 U.S. 294, 305 (1964). In conjunction with the Necessary and Proper Clause, art. I, sec. 8, cl. 18 of the Constitution, the Commerce Clause gives Congress authority to regulate activity that affects interstate commerce, even if the activity is purely local. See Katzenbach v. McClung, 379 U.S. at 301–302; NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258 (1964); Wickard v. Filburn, 317 U.S. at 123–125. In determining whether an activity affects interstate commerce, a single event should not be viewed in isolation. Fry v. United States, 421 U.S. 542, 547 (1975); Perez v. United States, 402 U.S. 146, 152 (1971). Rather, "[e]ven activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States." Fry v. United States, 421 U.S. at 547. Thus, Congress has authority to regulate a class of activities—and even to impose criminal penalties—"without proof that the particular intrastate activity against which a sanction was laid had an effect on commerce." Perez v. United States, 402 U.S. at 152; Russell v. United States, 471 U.S. 858 (1985); Wickard v. Filburn, 317 U.S. at 127–128. It has also been considered important to the Commerce Clause analysis that the problem Congress is addressing is national in scope and exceeds the ability of a single State or local jurisdiction to solve it. See Perez v. United States, 402 U.S. at 150 (noting that organized crime operates on a national scale and, therefore, Congress can regulate local loan sharking activity); Katzenbach v. McClung, 379 U.S. at 301 (noting as justification for enactment of the Civil Rights Act of 1964 testimony before Congress that racial discrimination is a problem of nationwide scope).

S. 636 falls easily within the commerce power. Just as Congress had authority in the Civil Rights Act of 1964 to prohibit racial discrimination in public accommodations because it artificially restricted the market and the flow of merchandise, Katzenbach v. McClung, 379 U.S. at 299–300, and, on the same basis to make criminal racially motivated assaults that interfere with federally protected rights in the Civil Rights Act of 1968, see 18 U.S.C. 245(b), it has authority to prohibit interference with individuals seeking to obtain or provide abortion services.

The provision of abortion services is commerce. The entities that provide these services, including clinics, physician's offices, and hospitals, purchase or lease facilities, purchase and sell equipment, goods, and services, employ people, and generate income. Not only do their activities have an effect on interstate commerce, but they engage directly in interstate commerce. It should be easy to document that they purchase medicine, medical supplies, surgical instruments, and other supplies produced in other States.

Moreover, it is well-established that many serve significant numbers of patients from other States. For example, in Bray v. Alexandria Women's Health Clinic, 113 S. Ct. at 762, the Supreme Court accepted the district court's finding that substantial numbers of patients at abortion clinics in the Washington, D.C., area traveled interstate to obtain the services of the clinics. In Wichita, KS, the Federal district court found that some 44 percent of the patients at one clinic came from out of State. See New York State NOW v. Terry, 886 F.2d at 1360 (many women travel from out-of-State to New York clinics). Thus, there can be little doubt that abortion providers are engaged in interstate commerce and Congress should not have difficulty developing a legislative record allowing it to make such a finding.

In addition, it is equally clear that the types of activities that would be prohibited by S. 636 have a negative effect on interstate commerce. As the committee will hear, clinics have been closed because of blockades and sabotage and have been unable to provide services. Abortion providers have been harassed and frightened into ceasing to perform abortions and, of course, Dr. Gunn, tragically, has been prevented from ever again engaging in this form of commerce. Congress, therefore, should have no difficulty in gathering evidence supporting a conclusion that the conduct prohibited by S. 636 results in the provision of fewer abortions and less interstate

movement of people and goods. This situation is analogous to the exercise of the commerce power in passing Title II of the Civil Rights Act of 1964, which was premised on the conclusion that restaurants that discriminated served fewer customers and, therefore, suppressed interstate commerce. See Katzenbach v. McClung, 379 U.S. at 299–303. Here, however, the justification is even more compelling, since the very purpose' of those who engage in conduct that would be prohibited by S. 636 is to suppress the provision of abortion services.

In addition, this committee should be able to establish that the conduct prohibited by S. 636 has a depressant effect on general business conditions in the areas where these activities occur. Evidence may exist that landlords have been reluctant to lease facilities to abortion providers or that businesses have been deterred from locating near such providers, or that individuals have been deterred from frequenting businesses in those areas.

Therefore, there can be no doubt that evidence exists upon which Congress can base an irrebuttable conclusion that the activity prohibited by S. 636 has an effect on interstate commerce and can be regulated by Congress pursuant to the Commerce Clause. In that regard, I suggest that the committee expand the findings section of S. 636 to reflect the elements that I have just discussed. I also recommend expansion of the purpose section of the bill to include a statement that it is designed to protect the free flow of goods and people in interstate commerce.

B. Section 5 of the fourteenth amendment

The findings section of S. 636 states that the bill is also grounded in Section 5 of the Fourteenth Amendment. That Section grants Congress authority to "enforce by appropriate legislation the provisions of" the Amendment. Section 1 of the Fourteenth Amendment protects individuals only against actions taken by the States or that can fairly be ascribed to the states. Since United States v. Guest, 383 U.S. 745 (1965), however, there has been a suggestion that even though section 1 of the Fourteenth Amendment reaches only state action, Congress may have power pursuant to section 5 of the Amendment to punish private conduct that interferes with the exercise of a right protected by section 1. Six Justices agreed to that view in dicta in Guest, 383 U.S. at 782 (opinion of Brennan, J., joined by Warren, C.J., and Douglas, J., concurring in part, dissenting in part); id. at 761 (Clark, J., concurring, joined by Black and Fortas, JJ.), and the Court expressed support for an expansive view of congressional authority pursuant to Section 5 in Katzenbach v. Morgan, 384 U.S. 641 (1966). The Court, however, has never had occasion to address the question squarely. As a matter of statutory interpretation, it has refused to read 42 U.S.C. 1985(3) as reaching private conspiracies to interfere with rights protected pursuant to section 1 of the Fourteenth Amendment. See Bray v. Alexandria Women's Health Clinic, supra; Carpenters v. Scott, 463 U.S. 825, 831 (1983).

In Bray, the dissenting Justices would have held that an action against a private conspiracy to prevent law enforcement officials from protecting women who are exercising the right to have an abortion would be prohibited by 42 U.S.C. 1985(3). Justice Stevens explained that a conspiracy to interfere with the ability of law enforcement officers to perform their duties necessarily involves sufficient involvement with the state to trigger the right to an abortion. Under this theory, a finding that anti-abortion activists intend to divest law enforcement officers of their ability to perform their duties might give Congress authority to address such activities even without the need to adopt the broad analysis of Guest.

Thus, the power of Congress to enact S. 636 pursuant to Section 5 of the Fourteenth Amendment is less clear than its authority pursuant to the Commerce Clause. At this point, it is unclear how the jurisprudence of Section 5 will develop. It may well turn out that Congress has authority to enact this legislation pursuant to Section 5, but in the event that it does not, we urge Congress to make explicit that the Commerce Clause is an independent and adequate basis for the legislation, regardless of Section 5.

S. 636 IS CONSISTENT WITH THE FIRST AMENDMENT

Our review of S. 636 convinces us that it does not suppress expression in violation of the First Amendment. Rather, S. 636 is a facially valid prohibition of harmful conduct. The bill proscribes four specific types of conduct; (1) the use of force, (2) threats of force, (3) physical obstruction to injure, intimidate, or interfere with an individual seeking access to abortion services, and (4) destruction of the property of medical facilities. The purpose of the legislation plainly is to protect the right of access to abortion services and ensure that interstate commerce is not impeded. By focusing exclusively on forms of conduct that are widely recognized as harmful in the law, the legislation makes clear that it is not intended to suppress a particular message.

Of course, conduct can express a message and is frequently entitled to First Amendment protection, but the Supreme Court has acknowledged that "(t)he government generally has a freer hand in restricting expressive conduct than it has in restricting the—written or spoken word." Texas v. Johnson, 491 U.S. 397, 406 (1989). Therefore, the Court has concluded, "where 'speech and nonspeech elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms' * * * [so long as] the governmental interest in question [is] unconnected to expression." Id. at 407, quoting United States v. O'Brien, 391 U.S. 367, 377 (1969) (upholding a statute prohibiting destruction of a selective service card, even though the public burning of the card was expressive conduct, because the government had a sufficient interest in administering the selective service system that was unrelated to regulation of expression). Indeed, this reasoning is compelled by the fact that it is possible to find some element of expression in nearly any conduct, regardless how harmful the conduct may be to individuals or society. That possibility does not mean that government may not act. Rather, it means that government must have a sufficiently important reason for doing so. Suppression of the use of force, threats of force, physical obstruction, and destruction of property standing alone should supply a sufficient government interest, but when coupled with the need to do so to preserve the right of a woman to choose to have an abortion, there can be no doubt that the government's reason for acting is sufficiently important to justify any incidental effect on expression.

Indeed, the reasoning of the Supreme Court last Term in R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992), confirmed this conclusion. In that case, the Court struck down a city ordinance that prohibited expressions of hatred based on race, color, creed, or gender. It reasoned that the ordinance singled out otherwise permissible speech for censorship because it contained a disfavored message. In doing so, however, the Court reaffirmed that government can proscribe expressive conduct if the government "regulation is 'justified without reference to the content of the * * * speech.'" Id. at 2546 (emphasis in the original), quoting Renton v. Playtime Theatres. Inc., 475 U.S. 41, 48 (1986). The Court noted that the wide range of civil rights laws that prohibit conduct that was pursued because of the victim's race, color, religion, national origin, or gender do not violate the First Amendment, even though such conduct often has powerful expressive content, because the "government (has) not target[ed] conduct on the basis of its expressive content. "R.A.V. v. City of St. Paul, 112 S. Ct. at 2546–47.[2] Rather, government has acted to protect the rights of individuals to be free of the invidious harm inflicted by discrimination.

S. 636 fits easily within this analysis. It addresses traditionally proscribable conduct—the use of force, threats of force, physical obstruction, and destruction of property—not because of its expressive content, but because—and only if—it injures, intimidates, or interferes with an individual's access to abortion services or results in the destruction of property. The bill, therefore, is valid because it does not target conduct on the basis of its expressive content, but is an effort to protect individuals in the exercise of their right to choose an abortion and to eliminate the harmful effect on interstate commerce resulting from interference with the exercise of that right. That justification is surely sufficient to override any incidental effect that the bill may have on expression.

Similarly, the fact that S. 636 singles out only those individuals who act with the required intent is not an indication that it disfavors certain expression. Rather, the intent requirement is a means of defining the interest that government can legitimately protect and is seeking to protect through enactment of S. 636. See Cox v. Louisiana, 379 U.S. 559, 560 (1965) (upholding a Louisiana statute prohibiting picketing near a courthouse "with the intent of interfering with, obstructing, or impeding the administration of justice). In this regard, S. 636 resembles numerous Federal statutes that prohibit intimidating or interfering with an individual who is engaged in a federally protected activity.[3]

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[2] See, e.g., 42 U.S.C. 2000e–2 (prohibiting discrimination in employment); 42 U.S.C. 1981 (prohibiting racial discrimination in making "and enforcing contracts); 42 U.S.C. 1982 (prohibiting racial discrimination in the sale or rental of property); 42 U.S.C. 1973 (prohibiting discrimination in voting); 18 U.S.C. 242 (making criminal the imposition under color of law different penalties because of the victim's race); 18 U.S.C. 245(b) (prohibiting force or threat of force to interfere because of race with the victim's exercise of Federal rights).

[3] See, e.g., 18 U.S.C. 112(b) (making it unlawful to "intimidate [], coerce[], threaten[] or harass[] a foreign official . . . in the performance of his duties"); 18 U.S.C. 245(b) (providing "[w]hoever . . . by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with—any person because he is or has been, or in order to intimidate such person or any other person or any class of persons from (exercising certain designated rights) violates the law); 18 U.S.C. 372 (making it unlawful to "conspire to

S. 636 is narrowly tailored to accomplish its legitimate goal. Through the limitations imposed by the intent requirement and the specifically described conduct that is prohibited, S. 636 avoids unnecessary restriction of expressive conduct. Nor is S. 636 vague. Men and women of common intelligence will have little difficulty discerning what conduct it prohibits. Certainly proscriptions on the use of force, threats of force, physical obstruction, and destruction of property are sufficiently clear and well known in the law that they will not cause confusion.

S. 636 NEEDS ONLY MINOR CHANGES

As I stated earlier in my testimony, S. 636 is an outstanding bill, which I heartily endorse, but it can be improved. First, I have already mentioned that the findings and purpose sections should be expanded to describe the connection of the bill to interstate commerce and to make clear that a purpose of the bill is to remove impediments to interstate commerce. I have also already urged that the coverage of abortion providers be made more explicit by adding the words "or providing" after "obtaining" in proposed 42 U.S.C. 2715(a)(1)(A).

I also suggest that the enhanced penalty for "second and subsequent offenses" be made applicable even when the defendant ha not been previously convicted of a prohibited activity. As currently drafted, proposed 42 U.S.C. 2715 would require a previous conviction before the enhanced penalty provision of proposed 42 U.S.C. 2715(b)(2) would apply. Our concern is that a person who engaged in a series of violations, such as repeated obstruction of abortion clinic entrances, over a period of weeks or even months would not be sentenced as a repeat offender since, in all likelihood, he would not have been indicted and convicted of the prior offenses. Because of the importance that we attach to deterring repeat offenders and the propensity that individuals involved in these activities have demonstrated to engage in repeated violations of the law, we urge deletion of the words "after a prior conviction" from proposed Section 2715(b)(2).

I am concerned by proposed 42 U.S.C. 2715(d), which gives the Secretary of Health and Human Services authority to investigate violations of proposed 42 U.S.C. 2715(a), the prohibited activities section of the bill. Since violations of this section would constitute criminal offenses, it is appropriate for the Attorney General to conduct such investigations. If the intent of the bill is to allow both the Attorney General and the Secretary to investigate the same conduct with an eye toward criminal and civil proceedings, respectively, I am concerned that the arrangement may lead to confusion, delay, and jeopardized investigations. I, of course, do not intend any slight of the ability of HHS to conduct such investigations. Since the Attorney General must, in any event, assume responsibility for an investigation before it is litigated, and since it is traditionally the role of the Attorney General, employing the resources of the Federal Bureau of Investigation, to investigate conduct that may lead to criminal charges, I strongly urge the substitution of "Attorney General" for Secretary" in proposed Section 2715(d) or, in the alternative, deletion of proposed Section 2715(d) altogether.

Finally, I suggest elimination of proposed Section 2715(g)(2) which defines Attorney General to include a large number of employees of the Department of Justice. The Department believes that the term "Attorney General" in a statute necessarily includes designees of the Attorney General. I am concerned that if this bill fleshes out the definition, it may undermine our position that other statutes that do not do so should be interpreted to include a broad definition.

S. 636 IS A GOOD BILL

Having told you those few things that I do not like about S. 636, let me tell you about the important features that I do like. First, as I have indicated, the definition of prohibited activities, with the addition of explicit protection for abortion providers, does a very good job of addressing the problem.

The inclusion of both civil and criminal penalties is very important. The civil remedies of injunctions and damages are appropriate as a means of addressing massive blockades. Courts can fashion injunctive relief that will keep clinics operating, yet allow room for the legitimate expression of opinion by demonstrators. Damages are

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prevent, by force, intimidation, or threat, any person from accepting or holding any office"); 18 U.S.C. 594 (prohibiting actual and attempted intimidation, threats and coercion "for the purpose of interfering with the right of (a)nother person to vote or to vote as he may choose"); 18 U.S.C. 1503 (providing "whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror . . . on account of any verdict or indictment assented to by him" violates the law); 42 U.S.C. 3631(a) (making it a crime for any person to interfere with housing rights "because of [a person's] race, color, religion, sex, handicap . . . familial status . . ., or national origin")

important to compensate those individuals who, seeking to exercise their rights, suffer real harm, whether physical or psychological. And the authorization of statutory damages is appropriate to encourage victims to pursue violations and as a deterrent to violators.

I also think it is very important, that the Attorney General have authority to file a civil action. This approach follows the model of other statutes protecting individual rights—notably the Fair Housing Act—by shifting the burden of civil enforcement from private victims to the government, which is often better able to pursue such cases and vindicate the enormous interest that our society has in protecting individual rights.

The authorization of criminal penalties is essential. As I stated earlier in my testimony, opponents of the right to choose have escalated the level of their opposition in recent years. They have demonstrated a willingness to break the law and to defy court injunctions. Unfortunately, criminal sanctions, including imprisonment, appear necessary to deter and punish unlawful conduct, as well as simply to incapacitate some of the more willful and persistent violators. In this regard, I think the elevated terms of punishment for repeat offenders and those who cause bodily injury or death are justified and necessary.

CONCLUSION

In conclusion, I wish to thank the Chairman for producing such an important and thoughtful bill. I urge this committee to consider the few changes that I have suggested and then to move expeditiously toward enactment of this essential legislation.

The CHAIRMAN. In my own State of Massachusetts, we have had violent incidents in Boston, Brookline, and Springfield, MA. We had the Planned Parenthood office in Worcester, MA, where a Molotov cocktail was thrown into the facility. We have in our own State a tough court order issued in 1991 dealing with this kind of activity, and it has had some impact.

But I am just wondering if you would comment on whether we can do this, State by State, given the fact that we are talking about a constitutional right and given the fact that in many States it would be highly improbable or virtually impossible to pass similar legislation, and whether in your view having Federal legislation is essential to provide these protections. I think you have a particular vantage point, and that is as a former prosecutor, a local prosecutor, who is very familiar with the local and State laws on vandalism and homicide and trespass. You bring a special kind of strength and credibility to the importance of national legislation. The question is why can't we just do this State by State, and why is it important to have a national law?

We will run a 6-minute clock. I will have my staff take off 2 minutes for the question.

Attorney General RENO. I think it is important, first of all, because the situation is so organized throughout the country.

I can speak from my vantage point as a prosecutor in Dade County, trying to find out information, when such operations were threatened or discussed or actually carried out in Miami, what was being done in other jurisdictions. It is extremely difficult for local law enforcement to find out from a variety of different and small police agencies in other States where there are no contacts just exactly what was going on and to coordinate intelligence activities. I think that this would be very important.

I think we have seen situations where local law enforcement can easily become overwhelmed, and we have no warning of this. It is important that Federal agencies be able to step in immediately in

a systematic way based, again, on the ultimate responsibility of the Federal Government to protect this very fundamental right.

The CHAIRMAN. How do you respond to the issue of the potential of this kind of legislation to infringe on the first amendment? I know we will have an opportunity later with Professor Tribe to talk about this in some detail. But I am just wondering what your own sense is of how, as a principal enforcer of the legislation, you balance the protections of the first amendment, and the need to protect a woman's constitutional right to choose.

Attorney General RENO. As I mentioned, one of the first things I did when I discussed it with my staff at the Department of Justice was to make sure that any legislation that was proposed protected first amendment expression because I think that is critical that we leave the ultimate search for truth in the marketplace of ideas freely expressed. At the same time, I don't think that protection should go to physical conduct that obstructs and threatens and physically interferes with somebody exercising a fundamental right.

All of our issues that involve sensitive constitutional issues involve a balance, and I think this proposed legislation very carefully strikes that balance, protects first amendment freedoms, and protects that fundamental right from physical obstruction.

The CHAIRMAN. That is certainly true about protecting the right to vote, for example, is it not? We don't permit individuals to interfere with the individual's right to vote. It has been upheld that individuals can't demonstrate within certain areas near the polls. We don't permit obstruction of justice, in permitting individuals to draw their own conclusions in a jury trial. We have certain rules with regard to silent protest and also different rules with regard to vocal protest. So there has been a balance in terms of the protection of an individual's rights that are guaranteed under the Constitution, and there has also been legislation to protect other rights.

Let me just ask you if you would address the issue of conduct away from the clinics. The tragedy affecting Dr. Gunn was actually at the clinic parking lot. Is it important in your own view that this legislation will also provide protections just beyond the narrow definition of an entrance, and what do you feel is the justification for that?

Attorney General RENO. I think the reasons are clear because we have received increased information over these last several weeks that the activities of some of the antiabortion groups have moved away from clinics to the homes and neighborhoods of doctors and to the schools and stores that they may be directly involved in. Violence can occur in any of these places, and I think it is important that we recognize that in, again, protecting this fundamental right.

The CHAIRMAN. Finally, how do you view the Justice Department's role in guaranteeing this protection? I think you outlined it to some extent in your earlier statement. Is the Justice Department prepared to play its role in terms of meeting its responsibilities under this law?

Attorney General RENO. Absolutely. If this legislation had been in effect in these last months, what I would see us doing is forming a partnership with State and local law enforcement.

As you will recall, at my confirmation hearing, I said that that was one of my ultimate aims, not to superimpose Federal Government on local governments, but to work together in a good partnership that utilizes the authority of the Federal Government when it is appropriate, but works with local law enforcement to avoid duplication, to avoid confusion, and to see that State and Federal laws are ultimately upheld.

The CHAIRMAN. That was certainly the record when you appeared at the Judiciary Committee. That was the experience that we saw with your own prosecutorial discretion in working with State laws and Federal laws in Dade County. So I think you have demonstrated by your own history that these aren't just words, but it has been a lifetime commitment.

Attorney General RENO. I would also say in that regard, Senator, because it is important when people ask about the federalizing of crimes or the federalizing of issues, that I have also said that it is important that we have a principled analysis of what should be Federal and what should be State, and we have engaged in that type of analysis in this particular case to make sure that it is carefully drafted with that in mind.

The CHAIRMAN. That is very commendable.

Senator Kassebaum.

Senator KASSEBAUM. Mr. Chairman, first, I would like to ask that my full statement be made a part of the record, as well as the statements of Senator Hatch and Senator Thurmond. Senator Hatch has asked that the record remain open for a week, so that testimony from witnesses who could not appear today be included in the record.

The CHAIRMAN. It will be so ordered.

[The prepared statements of Senators Kassebaum, Thurmond, and Hatch follow:]

PREPARED STATEMENT OF SENATOR KASSEBAUM

I am very disturbed by violent acts that have been directed against abortion clinics, clinic staff, and patients. Last summer, the city of Wichita, KS, was targeted by Operation Rescue and other abortion protesters in what was referred to as the "Summer of Mercy." Abortion is a very emotional and divisive issue in this country, as exemplified by the unrest and discord experienced in Wichita.

The attempts to blockade abortion clinics in Wichita resulted in the deployment of the National Guard when local law enforcement officials were unable to maintain access to the clinics. Appeals were made to the Federal courts to intervene and restore order, and Judge Patrick Kelly used the 1871 Federal law which was at issue in the Supreme Court case of Bray v. Alexandria Women's Health Clinic as the basis for Federal involvement to secure access to the clinics in Wichita. When the court rendered a decision in the Bray case, it struck down the use of the 1871 "Ku Klux Klan" law as the basis for Federal intervention in abortion clinic blockade situations.

I believe the Federal courts should have the authority and the responsibility to protect citizens from organized groups who are systematically and purposely denying them the ability to exercise their constitutional rights. At the same time, I believe in the right

of Americans to protest peacefully and do not support any abridgement of that right. However, the confrontational tactics used by some abortion activists have crossed the line from peaceful protest to interfering with the constitutional rights of others. The task that now confronts Congress is how to achieve a balance between these two rights.

The Senate version of this legislation would make it a Federal crime to use force, the threat of force, or physical obstruction intended to injure, intimidate or interfere with a person seeking to obtain or provide abortion services. In addition, the bill would prohibit the destruction of property of facilities providing abortion services. Violations of the proposed law would result in criminal penalties and create grounds for civil action against the perpetrators.

While much better than the House version of the bill, S. 636 raises some significant constitutional issues. Although overshadowed by the escalating number of violent acts associated with abortion protests, most clinic protests are peaceful in nature. I question whether the current Senate bill is written so broadly that it could be used to prohibit legitimate, peaceful protests against abortion.

For example, abortion protesters often walk alongside a patient—talking to her or trying to give her literature. Under S. 636, would such action be considered interfering with a person's right to an abortion or would it be the exercise of constitutionally protected speech? This is an important legal question which must be clearly addressed.

Moreover, this legislation identifies one particular viewpoint, opposition to abortion, and makes it a criminal act while ignoring other protests—such as labor disputes, animal rights activities, or environmental demonstrations—that may be equally violent. Congress must exercise caution and not attempt to prohibit the exercise of free speech, including expressive conduct, based on the content of that speech.

I am looking forward to hearing the testimony of the witnesses today and hope they will address my concerns about how we can protect the rights of women who wish to obtain abortions, while at the same time protecting the rights of peaceful abortion protesters.

PREPARED STATEMENT OF SENATOR THURMOND

Mr. Chairman: It is a pleasure to be here this morning to receive testimony on S. 636, the "Freedom of Access to Clinic Entrances Act of 1993". I would like to join my colleagues in welcoming our witnesses here this morning. I would especially like to recognize our new and able Attorney General, Janet Reno.

Mr. Chairman, this bill would make it unlawful to intentionally interfere with the access of an abortion facility. This measure would create a new Federal criminal offense for conduct that the states are currently able to address.

This bill would also, create a new civil right of action for those who have been intimidated or otherwise prevented from entering an abortion clinic. Yet another civil right of action would also be created for clinics and providers of abortion services. Further, the Attorney General would also be authorized to bring civil suits to

obtain injunctions against offensive conduct, seek damages for the victims, and impose stiff fines.

Mr. Chairman, many of the facilities that provide abortion services also provide other necessary medical services. It is not unreasonable to foresee a facility picketed due to concerns over animal research, AIDS funding, unfair working conditions, or a number of other reasons. It is quite possible that these activities would be covered. It is unlikely the sponsors of this bill intended this result.

This legislation apparently focuses on pro-life advocates and singles them out for Federal penalties because of the content and subject matter of their views and motivations. Concerns have been raised that this bill violates the equal protection and free speech guarantees of the U.S. Constitution.

Mr. Chairman, these are serious issues which must addressed. The hearing today will be helpful as we consider whether this legislation will unduly inhibit or chill the lawful expression of views surrounding this issue.

Again, I would like to welcome our witnesses here today, andI look forward to receiving their testimony.

PREPARED STATEMENT OF SENATOR HATCH

I welcome the hearing today on S. 636, the "Freedom of Access to Clinic Entrances Act of 1993." Let me make clear at the outset that I, like tens of millions of other Americans opposed to abortion, categorically condemn the killing of Dr. David Gunn and other acts of violence against abortion clinics and those providing abortion services. Resort to violence is no answer to the violence of abortion. I look forward to a consideration of whether State and local laws are inadequate to address this violence.

Several concerns have been raised over S. 636. First, many are concerned that the broad terms of S. 636 would apply to lawful, peaceful activity such as sidewalk counseling, and would at the very least severely chill this protected first amendment activity. Second, many are concerned that S. 636 singles out the pro-life message for harsh penalties that do not apply to identical conduct on behalf of other causes. The specter of viewpoint discrimination raises the question whether S. 636 violates the first amendment.

Others have raised a concern as to how S. 636 would treat purely peaceful civil disobedience that draws on the tradition of Gandhi and Martin Luther King Jr. Some say that S. 636 would subject peaceful civil disobedience in support of the pro-life cause to special penalties that do not apply to peaceful civil disobedience in support of such causes as pacifism, civil rights, or environmentalism. It has also been pointed out that S. 636 draws no distinction between violent lawlessness and peaceful civil disobedience.

Finally, some have expressed the concern that S. 636 does not speak to the problem of violence against pro-lifers. If we are to ensure civil peace on the abortion issue, we need to make sure that penalties for lawlessness apply equally to both sides. I hope that this hearing focuses adequately on these issues.

Senator KASSEBAUM. Madam Attorney General, thank you.

I first would like to say that some of my questions have been answered. You have given a very clear legal reasoning to helping us understand some aspects of the legislation. In many ways, I think

the Senate legislation is more carefully drawn than the House bill, but you have helped answer some of the questions that remained.

I also would like to State, since you mentioned Wichita, KS, that it was a terrible time for people on both sides of this issue in Wichita, KS. I would like to pay particular tribute to the U.S. marshalls. They performed above and behind the call of duty through great stress and difficulty in ways that I think spoke admirably to the Marshals Service.

Attorney General RENO. I will make sure that they know of that because, believe me, comments like that make a great deal of difference to people who are directly involved.

Senator KASSEBAUM. Well, it was a stressful time, and they handled it very well.

One question I had is—and I certainly agree that violence against laws must be addressed and the laws must be upheld, but this particular legislation identifies one particular viewpoint—opposition to abortion and violence that occurs as an expression of that opposition, and makes it a criminal act, while ignoring what perhaps has happened or could happen in other protests such as animal rights activists, environmental protests and others. Should we just continue to focus on this? I am looking to you to help analyze this. Is there any way we could take into consideration in other types of protests?

Attorney General RENO. This is the point I was referring to a little bit earlier, because one of the great issues that I have faced in these last 2 months since I have been sworn in was what should be Federal, what should be State, what can the States handle more appropriately than the Federal Government. So we have carefully reviewed this.

First of all, you have a very fundamental Federal right at stake here. Second, you have organized opposition that cuts across State lines. And I think everybody ought to be able to speak freely, but, again, that conduct is organized, it cuts across State lines and sometimes overwhelms local law enforcement. And I think clearly here, in distinction to other situations where the Federal constitutional right I don't think is proscribed, I think that creates the difference. And I think the Federal Government has a clear and very profound interest in making sure those Federal rights are protected.

Senator KASSEBAUM. You, answered most of the other questions I had earlier. Are you very comfortable that S. 636 isn't too broadly drawn?

Attorney General RENO. We have been over it with a fine-toothed comb.

And, Senator, I would just like to say, too, when I was confirmed, I tried to make it very clear to the Judiciary Committee that I looked forward to working with Congress, both parties, in trying to come up with the most carefully drawn legislation possible, where we reach agreement on as many issues as possible, and we look at it from a technical and legal point of view and give you our best advice. We have tried to do that here, and we have appreciated the opportunity, and we would like to do that on all issues in the future.

Senator KASSEBAUM. Thank you.

Thank you, Mr. Chairman. I value that.

The CHAIRMAN. Just a comment, since the Bray decision, those marshals wouldn't be eligible, would they, to be able to go into the situation like they did in Wichita?

Attorney General RENO. There are possibilities. We have explored those possibilities. In an emergency, the State could request Federal assistance. It could be possible. But it is a very cumbersome process that we consider inadequate.

The CHAIRMAN. Senator Pell.

Senator PELL. Thank you, Mr. Chairman.

What would be your suggestion, Attorney General Reno, as to what people should do who are at this point the object of harassment or violence in some cases? What can they do to protect themselves until this law comes into effect? Because as we know, laws can take a matter of months before they can be passed.

Attorney General RENO. As I understand it, and I have been in touch with both lawyers and people who are concerned about this issue throughout the country, members of the bar are organizing and working with local and State law enforcement, with many of the attorneys general, trying to organize as much as possible within State law to address the issue pending the passage of this legislation.

Where there is a clear ongoing emergency, we could always consider the possibility of providing assistance there, but too often, that is a cumbersome process, and we do not have warning of the emergency as it might exist.

Senator PELL. Do you see this as a very real possibility that there will be a continuation of this manner of conduct until the law is passed?

Attorney General RENO. I certainly think so, Senator. I think it is clear to everybody who has observed this now for some time that people care very deeply, and they sometimes take their caring beyond the bounds of what I suggest should be permitted in opposing a person's exercise of constitutional rights.

Senator PELL. Thank you very much, indeed.

The CHAIRMAN. Senator Coats.

Senator COATS. Thank you, Mr. Chairman.

Mr. Chairman, I want to make it clear for the record that I certainly don't condone or support acts of violence against anyone for any reason, and, in fact, even though I do support the pro-life side of this question, on March 11, 1993, I issued the following statement: "The use of violence or terror can never be justified in the cause of life. Insofar as any pro-life group shows a hint of tolerance for murder, it undermines the meaning of this movement. There can be no understanding or justification for murder, and there must be no hedging in our unconditional denunciation of such an act."

Having said that, Mr. Chairman, I have some questions regarding the legislation that is before us. I do not feel very adequate or competent to delve into the constitutional issues. I really believe it is more a matter for the Judiciary Committee, and I certainly would feel more comfortable if this hearing were being held by that committee, given their expertise and given the subject matter of

this issue. But I will do my best to raise some questions that I have to Attorney General Reno.

I am concerned about the language in section 3. Part of that language, which I think is very vague and not defined at all, prohibits activities "by force or threat of force." I certainly have no problem with that. And then it says "or by physical obstruction intimidates or interferes with or attempts to injure, intimidate or interfere with." I am not sure what "attempts to interfere or intimidate" means. Does that mean handing someone a pamphlet saying they think the individual ought to reconsider the action they are about to take? Is that an interference?

Attorney General RENO. I don't think that would be an interference.

Senator COATS. Would stepping in front of a person about to enter a clinic and simply saying, "Are you aware that this clinic has a record of a lot of malpractice and botched abortions or injuries to women, and here are the statistics"—is that an interference or intimidation?

Attorney General RENO. Senator, one of the things that I learned as a prosector is never react to hypotheticals because every hypothetical defined in a Senate hearing room is going to have a slightly different variation on the streets than in the evidence that is brought to court, and that it would be better to look at the actual facts of a case and make that determination.

Senator COATS. I can appreciate that. I just think that the language here is drafted in such a way that an overly aggressive prosecutor, an overly activist court might use it as a basis of denying what would be legitimate protest or legitimate rights of free speech.

Attorney General RENO. I think your concerns are always valid. For 15 years, I have been trying to determine what legislatures and now Congress say in certain situations. Sometimes it is the subject of dispute, and we always have to guard against overzealous prosecutors, but I think that comes back down to that extraordinarily delicate balance that we have to strike between the rights of all people involved. And I think that the language is sufficiently clear when applied to actual facts that we can strike that balance, understanding that you have protections built into our whole judicial system for, God forbid, those overzealous prosecutors.

Senator COATS. Well, it seems to me the intent of the bill is to prevent physical violence, and I certainly support that, and I think we would all support that. It just seems to me that it goes well beyond that. I haven't drawn a complete conclusion in terms of how the language ought to be written, but I would look forward to, I think, a very sincere and thorough discussion of the matter and, again, would feel, certainly, much more comfortable if a different committee with jurisdiction over the issue was handling it.

Let me just go on. The penalties that are imposed here are, I think, what most would define fairly severe, particularly when you compare them with similar acts if they occurred under other forms of protest.

For instance, we are giving for a first offense violation, if someone is found to, say, intimidate or attempting to intimidate, a 1 year prison sentence, 3 years for a second offense, a substantial

fine which the Department of Justice is able to levy $15,000 for a first violation, $25,000. It seems out of line with the penalties that are imposed for other acts of protest.

Certainly, under the civil rights protest of the sixties and the seventies, these would have been considered very extreme penalties and, I think, probably protested loudly and vigorously by the Congress were they imposed for a similar act. In other words, an attempt to interfere in the civil rights marches of the 1960's and the 1970's with a first-time penalty of a year in prison and a $15,000 fine, I think the Congress would have violently—"violently" is the wrong word—would have vigorously protested that penalty.

Do you think that is a fair application of a penalty?

Attorney General RENO. It is not more than a year. As I understand it, it is the general penalty structure, and, again, I think that the appropriate penalty will be imposed based on the guidelines and based on the court and based on all the circumstances.

Senator COATS. In your opinion, should these penalties apply across the board to other forms of protest, antinuclear, environmental, civil rights, labor movement protests and others?

Attorney General RENO. As I indicated earlier——

Senator COATS. For a similar offense.

Attorney General RENO. As I indicated earlier, this is a particular fundamental right that I think deserves——

Senator COATS. Civil rights is not a particular fundamental right for blacks or minorities?

Attorney General RENO. You have just referred to nuclear protests and——

Senator COATS. Well, let's just take the civil rights movement.

Attorney General RENO. I think what we have tried to do is match this and tried to make it consistent with the whole approach to civil rights.

Senator COATS. But it is not consistent. The penalties are not consistent.

Attorney General RENO. If there are——

The CHAIRMAN. I will remind the Senator, I happened to be an author of the Sentencing Commission, and we have drafted this so that it would be consistent with the Sentencing Commission Guidelines. And we worked with the Justice Department on it and care very deeply about those guidelines.

Of course, you are not talking just about protest. You are talking about other action included in it, the use of force, threat of force, physical destruction, and obstruction of property.

Senator COATS. I understand that.

The CHAIRMAN. So it has nothing to do with protest.

Senator COATS. I think that may be appropriate for those violations.

My question is whether that is an appropriate penalty for an attempt to interfere.

Attorney General RENO. My understanding is that the penalties provided here are consistent with the general penalty and sentencing structure provided for similar activity against the exercise of fundamental constitutional rights.

Senator COATS. Including attempt to interfere?

Attorney General RENO. With what?

Senator COATS. With an individual's right to protest or right to enter a facility, with an individual's right to exercise what they consider to be their fundamental basic civil rights.

Attorney General RENO. I think that is where you have to draw the line, Senator, because you do not have a right to enter a particular place in certain situations, and what we are talking about here is a constitutionally protected fundamental right.

Senator COATS. A black doesn't have the right to enter an eating establishment?

Attorney General RENO. If you want to put it in those terms, that is what we look at. And my understanding is that, with the civil rights developed by the Constitution and implemented by statute, this statutory framework and penalty framework is the same.

Senator COATS. I think that is something we ought to investigate further. I am not sure that I agree with you on that. I would like to see the evidence that it is the same and applied equally across the board for a similar act. And again, I am not talking about a penalty for an act of violence. I am talking about a penalty for an attempt to interfere, and given the vagueness of that term, it seems to me that that creates some problems here with this legislation.

Attorney General RENO. We are always happy to review any situation such as that.

Senator COATS. Do you think the penalties ought to be applied equally to attempts that are made against pro-life facilities or protests? For instance, if a similar act of interference exists against a pro-life office, headquarters, or someone carrying the pro-life view, should the same penalties apply if a pro-abortion person commits a similar offense?

Attorney General RENO. I would be happy to review the legislation. I am not sure it would be——

Senator COATS. That is not included in this bill, though?

Attorney General RENO. No, not to my understanding.

Senator COATS. I think my time has expired, Mr. Chairman.

The CHAIRMAN. Yes.

The terms of the criminal penalties are exactly consistent with the other civil rights criminal statutes. If there are any members of the committee that are confused or troubled by that, we will be glad to go over that in careful detail because we have made them virtually identical.

Second, as the Attorney General has pointed out, this isn't just with regard to protest. There has to be action. The use of force, threat of force, physical obstruction, destruction of property, that is what we are talking about.

Senator COATS. And "attempt to intimidate"; I don't know what "attempt to intimidate" means.

The CHAIRMAN. Well, we can get into that at another time. We have used that. And we are going to hear from Professor Tribe on that issue, and we will have a good opportunity to review it.

Finally, on the issue——

Senator COATS. Well, Mr. Chairman, I would like to hear from the Attorney General.

The CHAIRMAN. Just finally, on the issue of whether this is the appropriate committee, this committee has jurisdiction on the free-

dom of choice issue. We are dealing with reproductive rights, which is directly related to this bill, and it is entirely appropriate that we deal with this issue.

Senator COATS. Aren't we talking about criminal penalties here?

The CHAIRMAN. That is what we are talking about. We have dealt with other such issues, Senator. I am not going to take the time of the committee. We have dealt with other kinds of issues relating to labor protections and discrimination, in the *Griggs* case, the Civil Rights Act, a year ago. We have dealt with the availability of taxpayers' funds being used in discriminatory ways at educational institutions in the *Grove City* case. This is completely consistent.

I understand the Senator's opposition to this legislation, but we will have an opportunity——

Senator COATS. Mr. Chairman, I am not opposed to this legislation. I made that statement very, very clear early on. I do not want it on the record that I am opposed to this legislation.

The CHAIRMAN. OK.

Senator COATS. Does this Senator have the right to ask a question as to whether this legislation is perfectly drafted or whether there ought to be some changes in it? When the Attorney General of the United States comes before the committee, do I have the right to do that?

The CHAIRMAN. You have it, and you have the right to do it, and——

Senator COATS. Well, don't say that this Senator is opposed to this legislation.

The CHAIRMAN. —the other Senators have a right to have an equal amount of time.

Senator COATS. Mr. Chairman, I would like to have you make for the record a retraction stating that I am opposed to this legislation, when I opened my statement saying I support the legislation but I have some questions.

The CHAIRMAN. That is fine.

Senator COATS. Well, would you please clarify the record?

The CHAIRMAN. I will correct the record. I am glad that the Senator supports the legislation.

Now we will go on to Senator Metzenbaum.

Senator GREGG. Point of order, Mr. Chairman——

The CHAIRMAN. We will go on to Senator Metzenbaum.

Senator GREGG. We are not taking points of order?

The CHAIRMAN. No.

Senator GREGG. Or parliamentary inquiries?

The CHAIRMAN. Not on this issue.

Senator Metzenbaum is recognized now.

Senator COATS. Do the rules of the Senate apply, Mr. Chairman, in a committee meeting?

The CHAIRMAN. Rules of the Senate with regard to this committee have been established and will be enforced. The Senator has had his amount of time. Other members are entitled to inquire, and the chairman of the committee will recognize the Senators, as we have recognized them for a long period of time, even prior to the time that the Senator became a member of the committee.

We are glad to recognize Senator Metzenbaum now for his turn in inquiring of the Attorney General.

Senator METZENBAUM. Mr. Chairman, thank you very much.

Thank you, Madam Attorney General. I am very pleased that you are here and appreciate the actions that you have already undertaken in this area, and I am, frankly, encouraged much by your support for this legislation.

What has transpired in Florida in the cold-blooded murder of Dr. David Gunn has just shocked the Nation. That anyone could act in such a despicable and illegal manner to stop people from exercising their legal rights of entrance to an abortion clinic and to indicate their opposition to abortion by killing a doctor who is practicing in that area, is just unbelievable. And it seems to me that this is an area that all of us ought to be fighting as hard as we can and as fast as we can in order to change the law, so that it will never happen again. We can't bring back Dr. David Gunn, but we certainly cannot forget the price that he has paid and make it possible, if it is possible, to permit women who want to enter an abortion clinic for counseling or for such action as may be deemed appropriate shall have the right to do so without being inappropriately barred from that entry.

I am pleased to work, as I think all of us are, with you, Madam Attorney General, and I think that this is an area that the faster we can move this legislation forward, the more respect the people of this country will have for the Congress of the United States.

Thank you.

The CHAIRMAN. Senator Gregg.

Senator GREGG. First, I would State that I believe that this committee is subject to the rules of the Senate, and I believe under the rules of the Senate a request on a point of order or a parliamentary inquiry takes precedence over recognition. Therefore, I think the Chair ruled incorrectly, but that is obviously the right of the Chair, and if I were to challenge the Chair, I think I might lose.

The CHAIRMAN. The Senator is correct, but we are glad to entertain your keen observation. We are glad to entertain it.

Senator GREGG. Ironically, I am correct on both points.

This bill does have some questions which I think are significant, which I think Senator Coats was trying to get to.

Let me ask you a few. I recognize you don't like hypotheticals, but let me ask you a few that I think are so obvious that they would apply to this bill. If people coming to the center were driving in automobiles or buses and they were clubbed or bricked, the buses were hit with bricks or clubbed, or if the buses were hit with eggs or tomatoes, or if the people walking into the clinics were hit with eggs or tomatoes, or their clothes were torn, or if broken glass or tacks were strewn in the way of the individuals trying to get into the clinic, I presume that this bill would apply to all of those instances.

Attorney General RENO. I would look at it all very carefully, but generally, without commenting on specific factual situations, it should be covered.

Senator GREGG. Now, I guess my question is then why aren't we applying this bill to the situation where labor strikes. In every one of those instances that I just outlined, you have instances of labor

strikes where that has occurred, and it has been cited by Federal precedent. I have a list here of it looks like over 5,000 violent acts in the area of labor strikes that occurred since 1975.

The reason it is not being applied in labor strikes is because the NLRB has held that a certain amount of violence occurs in labor situations because of the confrontation over the nature of the situation.

Shouldn't we in labor issues apply this same standard as you are applying here? Are you saying because this is a constitutional right of such a higher authority than the right of a person to protect their right to make income and to have the freedom in the workplace that that is not?

Attorney General RENO. I am a little nonplussed because I do come from a local jurisdiction and have not had that much exposure to labor law, but I don't quite understand condoning clubbing people for anything.

Senator GREGG. Let me simply read to you from the NLRB position on this issue.

Attorney General RENO. Well, what I would suggest——

Senator GREGG. Let me read it to you because you don't appear to be familiar with the law——

Attorney General RENO. I would answer your——

Senator GREGG. —and this is a law that your——

The CHAIRMAN. The witness is entitled to answer, Senator.

Senator GREGG. I would like to have a chance to propound the question, also. Let me read the point. The NLRB's position has been that, "The application test in determining whether a striker accused of misconduct should be returned to work is whether that misconduct is so violent and of such a serious nature as to render the employee unfit for further service, and trivial rough incidents do not apply occurring in a moment of what the NLRB defines as 'animal exuberance'." Those are the exceptions which the NLRB is using in testing whether or not acts of violence.

Now, clearly, those exceptions would amount to intimidation under your language. So what you are saying is that we are going to have one standard for labor strikes, but we are going to have another standard at the front of an abortion clinic?

Attorney General RENO. No, sir, that is not what I am saying.

Senator GREGG. Well, that is what your testimony represents.

Now, let me look at this——

Attorney General RENO. No, sir, my testimony does not represent that.

What I said was I don't think that clubbing somebody is condoned. What you just read was something that I would be happy to research. And I don't know whether you were here when I spoke to the Senator. If there are legitimate issues that need to be reviewed, my staff wants to look forward to the opportunity to review those issues with you, to look carefully at the precedent, to look at what you are reading, to research the issue in a thoughtful and responsible sort of way.

But if I heard you correctly, Senator, what you said was that that person would have a right to return to work under a certain situation, and that is not addressed here. That is a different situation, and I think that gives rise to the fact that if there are issues

like that, that you would like to have addressed, we will carefully address them, look at them, look at the labor law, look at any other issue, but do it in a careful and thoughtful way where we have the precedence at our command and can carefully address it.

Senator GREGG. I think on the face of it, this committee is not going to take up limitations on labor strikes in that area.

Now, on the language of this bill, Section 2715, the language says, ". . . by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with . . . ." I think the language I have the most problem with here is this term "intimidates."

Intimidate is a subjective event, of course. I could be intimidated by one fact pattern. You could be intimidated by another, I suspect. Significantly, it would have to be a much tougher situation. And somebody else could be intimidated by an entirely different series of events. For example, if a motorcycle gang showed up with their colors on, I would probably be intimidated if I were standing in front of a restaurant they wanted to go into and they said get out of the way.

But the issue is purely subjective. And so you have set up a standard here on which I don't understand how anyone comes to a finding on it. I don't see a definition of "intimidates" anywhere in this bill.

Attorney General RENO. The language that precedes that, some person can intimidate by manner, but that is not included here. It is by force or threat of force or by physical obstruction intentionally, and so it is the force or threat of force or physical obstruction.

Senator GREGG. Yes, but threat of force, if it is threat of force to attempt to intimidate, you have a whole series of language there that basically leads to an incredibly subjective determination.

Am I threatened with force if, as the example I used, I am standing out in front of a restaurant that a motorcycle gang pulls up in front of, wearing their colors? Am I threatened? Well, I don't know, but I might think I was theoretically. I think it is reasonable that many citizens might think they were; that there was a threat of force.

Attorney General RENO. I wouldn't.

Senator GREGG. Well, you wouldn't. That is correct. But I am not using you as the standard here, and I said that earlier. You are a much higher standard than many of us.

But the fact is there is no standard. It becomes totally subjective, this term "intimidation" and "attempt to intimidate."

Attorney General RENO. Senator, for 15 years, I construed what legislature said, and then some judges disagreed with what I did, and there is a process by which language is construed. I think this language has precedent, which can help construe it, and I feel very comfortable with it.

Senator GREGG. I recognize that, but I am saying there are some problems with that.

The CHAIRMAN. The Senator's time is up.

Senator GREGG. I was just handed this that said I had a minute remaining, and my time is up? That is the fastest minute I have ever met.

The CHAIRMAN. All right. Would the Senator continue?

Senator GREGG. No. If the Chairman wants to cut me off——

The CHAIRMAN. Don't give us that, Senator. Come on. If you have something that you want to ask, you are more than welcome to ask it.

Senator GREGG. Well, we will get back to this issue then. I would like to ask this question on the pro-life clinics or the pro-life headquarters.

You are saying under this law, and as I understand your summation of your position, it is that this bill does not apply to pro-life and that you couldn't really draft this bill to protect a pro-life center that came under threat from a group of people who were activists on the pro-choice side because, from your viewpoint, there is no fundamental right tied to the pro-life position. There is a fundamental right tied to the pro-choice position in your viewpoint, and it is not fundamental. I don't think they defined it constitutionally as fundamental; "constitutional right" is the correct term, I think. But, in any event, not splitting that hair which has been split a number of times, it would be your view that this could not be applied to anything other than somebody who was defending a constitutional right, in this case, the right to abortion, and, therefore, this probably couldn't apply. You couldn't probably make a mirror of this bill, applying it to pro-life, if I understand your argument for this bill.

Attorney General RENO. I haven't made an argument with respect to pro-life facilities.

Senator GREGG. But I understand under your theory that you probably couldn't; that you couldn't apply this bill.

Attorney General RENO. I haven't addressed the issue.

Senator GREGG. Well, could you?

Attorney General RENO. I would be happy to review the legislation that you proposed, as I indicated to Senator Coats.

Senator GREGG. Would you be willing to draft legislation that would apply, as this legislation draft is applied to the pro-life situation?

Attorney General RENO. I am happy to review it, just as we reviewed what the Chairman has proposed.

The CHAIRMAN. Of course, has there been a national threat on the issues of pro-life? I mean, that, I understand, is the fundamental aspect of it.

I will just put in the record 18 U.S.C. Section 245(b), and 42 U.S.C. Section 3631 of the Fair Housing Act, which have the identical language with regard to the use or threat of force, which has been debated and redebated and debated and redebated again. But I will put that in the record.

[Documents follow:]

(b) Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with—

(1) any person because he is or has been, or in order to intimidate such person or any other person or any class of persons from—

(A) voting or qualifying to vote, qualifying or campaigning as a candidate for elective office, or qualifying or acting as a poll watcher, or any legally authorized election official, in any primary, special, or general election;

(B) participating in or enjoying any benefit, service, privilege, program, facility, or activity provided or administered by the United States;

(C) applying for or enjoying employment, or any perquisite thereof, by any agency of the United States;

(D) serving, or attending upon any court in connection with possible service, as a grand or petit juror in any court of the United States;

(E) participating in or enjoying the benefits of any program or activity receiving Federal financial assistance; or

(2) any person because of his race, color, religion or national origin and because he is or has been—

(A) enrolling in or attending any public school or public college;

(B) participating in or enjoying any benefit, service, privilege, program, facility or activity provided or administered by any State or subdivision thereof;

(C) applying for or enjoying employment, or any perquisite thereof, by any private employer or any agency of any State or subdivision thereof, or joining or using the services or advantages of any labor organization, hiring hall, or employment agency;

(D) serving, or attending upon any court of any State in connection with possible service, as a grand or petit juror,

(E) traveling in or using any facility of interstate commerce, or using any vehicle, terminal, or facility of any common carrier by motor, rail, water, or air;

(F) enjoying the goods, services, facilities, privileges, advantages, or accommodations of any inn, hotel, motel, or other establishment which provides lodging to transient guests, or of any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility which serves the public and which is principally engaged in selling food or beverages for consumption on the premises, or of any gasoline station, or of any motion picture house, theater, concert hall, sports arena, stadium, or any other place of exhibition or entertainment which serves the public, or of any other establishment which serves the public and (i) which is located within the premises of any of the aforesaid establishments or within the premises of which is physically located any of the aforesaid establishments, and (ii) which holds itself out as serving patrons of such establishments; or

(3) during or incident to a riot or civil disorder, any person engaged in a business in commerce or affecting commerce, including, but not limited to, any person engaged in a business which sells or offers for sale to interstate travelers a substantial portion of the articles, commodities, or services which it sells or where a substantial portion of the articles or commodities which it sells or offers for sale have moved in commerce; or

(4) any person because he is or has been, or in order to intimidate such person or any other person or any class of persons from—

(A) participating, without discrimination on account of race, color, religion or national origin, in any of the benefits or activities described in subparagraphs (1) (A) through (1) (E) or subparagraphs (2) (A) through (2) (F); or

(B) affording another person or class of persons opportunity or protection to so participate; or

(5) any citizen because he is or has been, or in order to intimidate such citizen or any other citizen from lawfully aiding or encouraging other persons to participate, without discrimination on account of race, color, religion or national origin, in any of the benefits or activities described in subparagraphs (1) (A) through (1) (E) or subparagraphs (2) (A) through (2) (F), or participating lawfully in speech or peaceful assembly opposing any denial of the opportunity to so participate—

shall be fined not more than $1,000, or imprisoned not more than one year, or both; and if bodily injury results shall be fined not more than $10,000, or imprisoned not more than ten years, or both; and if death results shall be subject to imprisonment for any term of years or for life. As used in this section, the term "participating lawfully in speech or peaceful assembly" shall not mean the aiding, abetting, or inciting of other persons to riot or to commit any act of physical violence upon any individual or against any real or personal property in furtherance of a riot. Nothing in subparagraph (2) (F) or (4) (A) of this subsection shall apply to the proprietor of any establishment which provides lodging to transient guests, or to any employee acting on behalf of such proprietor, with respect to the enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of such establishment if such establishment is located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor as his residence.

SUBCHAPTER II—PREVENTION OF INTIMIDATION

§ 3631. Violations; bodily injury; death; penalties

Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with—

(a) any person because of his race, color, religion, sex or national origin and because he is or has been selling, purchasing, renting, financing, occupying, or contracting or negotiating for the sale, purchase, rental, financing or occupation of any dwelling, or applying for or participating in any service, organization, or facility relating to the business of selling or renting dwellings; or

(b) any person because he is or has been, or in order to intimidate such person or any other person or any class of persons from—

(1) participating, without discrimination on account of race, color, religion, sex or national origin, in any of the activities, services, organizations or facilities described in subsection (a) of this section; or

(2) affording another person or class of persons opportunity or protection so to participate; or

(c) any citizen because he is or has been, or in order to discourage such citizen or any other citizen from lawfully aiding or encouraging other persons to participate, without discrimination on account of race, color, religion, sex or national origin, in any of the activities, services, organizations or facilities described in subsection (a) of this section, or participating lawfully in speech or peaceful assembly opposing any denial of the opportunity to so participate—

shall be fined not more than $1,000, or imprisoned not more than one year, or both; and if bodily injury results shall be fined not more than $10,000, or imprisoned not more than ten years, or both; and if death results shall be subject to imprisonment for any term of years or for life.

Pub.L. 90–284, Title IX, § 901, Apr. 11, 1968, 82 Stat. 89; Pub.L. 93–383, Title VIII, § 808(b)(4), Aug. 22, 1974, 88 Stat. 729.

The CHAIRMAN. Senator Mikulski.

Senator MIKULSKI. Thank you, Mr. Chairman.

Several of my questions have been asked by both Senator Kennedy and Senator Kassebaum. I would like to pick up on one of the lines of questioning raised by Senator Coats. That goes to the protection of people who engage in protest.

I have been a protester. I got into politics leading a protest against a 16-lane highway. All of our protests were nonviolent, and, also, we even did reverse protests where we held festivals to show our neighborhoods why we wanted to save them. At the same time, I have been picketed, and, at other times, I have even been abused, as have been members of my family, because of my pro-choice stand.

I have been picketed at town hall meetings. In an office that I ran in the neighborhood that I served as a city councilwoman, my mother doing volunteer work was subject to the abuse of people throwing baby dolls with ketchup poured over them into my office. I called no police officer, nor did I regard it as a disturbing of the peace. So I have been on one side of the line picketing, and I have been on the other side being picketed. But I am a public official. I am not a doctor. I am not a nurse. I am not a health clinic.

My question then becomes how do we allow the free expression of people who have legitimate views—and there are legitimate and differing views here on the subject of abortion—how do we allow that expression and, at the same time, not block access to treatment nor so discourage people that they are fearful of seeking that? And I wonder if you feel that this law then meets those two goals which, on the face of it, might seem either contradictory or subject to subjective interpretation.

Attorney General RENO. Again, as I said, one of my first concerns was that the bill do nothing that would inhibit free expression protected by the first amendment, but I don't think free expression is the equivalent of force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to do that, and I think that is where you draw the line. I think, based on the research that we have done, you can clearly protect the right of expression while, at the same time, prohibiting the physical interference or the attempt to do that.

Senator MIKULSKI. How do you characterize, then, yelling, screaming, and so on? For example, in a protest movement about an expressway—and I in no way mean to equate the seriousness of the two—we stood outside of city hall and said, "Hell, no, we won't go. Hell, no, we won't go," and chanted that for maybe a half-an-hour during a city council meeting. Then all of us have seen the other type of activity which, at times, might have a different decibel level. If you had to enforce this law, how would you interpret pro-life people saying, "Don't do it. Don't do it. Don't do it," as compared to some of the others?

Attorney General RENO. I think what you look at in terms of the threat is whether the result of that threat will be the natural and foreseeable consequence. I think you have to look at the ability to carry out that threat and whether the injury that we seek to protect would be the natural and foreseeable consequence of that threat.

Senator MIKULSKI. Later on there will be testimony where a woman who walked by herself in front of an abortion clinic, saying the rosary—a 53-year-old woman all alone praying outside of a clinic—was arrested because of some injunction. I am not familiar with the case. If we pass this law and we had one or another group of people who walked up and down and said their prayers according to their faith preference, that would not be impugned? In other words, they would not be violating this law?

Attorney General RENO. Just that, but be careful because they may be walking up and down, saying the rosary, having said something 10 minutes before that would have the foreseeable consequence of injuring somebody. Again, you have to look at all the facts.

Senator MIKULSKI. If that were the only set of facts?

Attorney General RENO. Yes. I think that expression should be protected under this act.

Senator MIKULSKI. Well, so do I, because that is called America. But, at the same time, I do believe that you should be able to enter a health clinic and so on and then be able to proceed in that way.

I want to go to what resources. If we pass this law, what will it take to enforce this legislation? And right now, what resources will you be able to call upon from your Department once this bill is passed that you could not call upon now to stop the harassment and violence against women, health care providers, and medical facilities?

Attorney General RENO. We could use Federal law enforcement, and, again, remember that there are provisions for emergency services. But we can plan for something to avoid the emergency, to avoid the crisis, to use Federal agents working with local law enforcement in a comprehensive way to properly address the issues, and, more importantly, we would have access to the Federal courts and Federal prosecutors to assist in the implementation of this Act.

Senator MIKULSKI. What couldn't you call up now? In other words, if there was a massive demonstration going on that met the criteria of this legislation, what couldn't you call up now?

Attorney General RENO. I could not use the U.S. attorneys except in certain situations, and there would be certain situations that Federal marshals or others were involved, emergency situations where the State had specifically asked for assistance. But in terms of planning, in terms of injunctive actions, in terms of sharing of information without an emergency, that, I cannot do adequately to protect this fundamental right.

Senator MIKULSKI. Mr. Chairman, I think I have used up my time, and I think I have pursued the line of questioning sufficiently.

The CHAIRMAN. Senator Durenberger.

Senator DURENBERGER. Mr. Chairman, thank you. Thank you, Madam Attorney General.

I have a full statement that I would like to be made a part of the record.

The CHAIRMAN. It will be made a part of the record.

[The prepared statement of Senator Durenberger follows:]

PREPARED STATEMENT OF SENATOR DURENBERGER

Mr. Chairman, I would like to thank you for holding this hearing to address the difficult issue of clinic access.

Like many of my colleagues, I was shocked and deeply saddened by the recent murder of David Gunn, a doctor who performed abortions, in Pensacola, FL. Although many Americans disagree with me, I personally believe that abortion is wrong.

To those of us whose opposition to abortion stems from a belief in the sanctity of life, the senseless act done in the name of preventing abortion that ended the life of Dr. Gunn was tragic irony.

Last month, the distinguished ranking member of this committee, Senator Kassebaum, and I introduced a Senate resolution that condemns in no uncertain terms the resort to violence to achieve social goals, particularly regarding the difficult issue of abortion.

As I said on the Senate floor when I introduced that resolution:

> Violence committed in the name of a cause does violence to the cause. This is particularly true when the very essence of the cause Is based on the value of human life.

Mr. Chairman, there is a fear that Dr. Gunn's shooting was not an isolated incident. In my home State of Minnesota, there have been several recent attempts to blow up a clinic in Robbinsdale. The people who work at these clinics—from doctors and directors to receptionists and even janitors—have been harassed both at work and in their homes.

In anticipation of a visit from the pro-life activist organization Operation Rescue this summer, Minnesota Planned Parenthood is tightening security, installing bullet-proof glass, and even considering issuing flak jackets to its doctors. Some Minnesota doctors have even begun to carry weapons.

I do not know how best to respond legislatively to this dilemma, but I do know that this madness must stop. In this regard, it is important to remember that the legislation we are considering today is not necessarily directed at violent behavior. The issue today is primarily one of access.

Mr. Chairman, I have some concerns about the bill that is before us. Primarily, my concerns stem from the belief that the bill—as it is currently drafted—is extremely broad, and that it may improperly chill valid first amendment speech. I also have questions about the severity of the mandatory criminal penalties contained in the bill.

However, I approach this issue with an open mind. I am extremely interested in hearing and reading the testimony of all of our witnesses today regarding this difficult issue.

During a recent mark-up, my colleague from Illinois, Senator Simon—whose view on abortion happens to be different from mine—said in essence that instead of being paralyzed by conflict, people on both sides of the abortion issue should work together where progress can be made.

I agree wholeheartedly. For example, I believe that people on both sides of this issue should work toward the common goal of reducing the tragedy of unwanted pregnancy.

I also believe we can work together to combat abortion-related violence and harassment.

Fundamental disagreements about abortion are inevitable. Let us recognize that those disagreements result from deeply held beliefs that may never change. But let us also recognize that it is time for a new era of dialog on this issue. We must search out those areas where we can work together for positive change.

America cannot let its passion overcome its compassion. If the opposing sides on difficult issues like abortion become even more polarized, we will lose opportunities for progress and our society will only become more fractured.

So I would like to take this opportunity to urge my colleagues to embrace common ground and pass Senate Resolution 90—a very tangible first step toward constructive change.

Senator DURENBERGER. And I am also going to assume—I am at another hearing simultaneously—that my colleague has already talked to you about the concerns expressed by a lot of people in our home State of Minnesota for some of the events that may occur.

Senator WELLSTONE. If the Senator would yield for a moment?

Senator DURENBERGER. Yes, I would be pleased to.

Senator WELLSTONE. I have not had a chance yet to raise any questions, so if you want to cover that ground, please do so.

Senator DURENBERGER. Let me mention two things. No. 1, the Senator from Kansas, our ranking member, and I are authors of Senate Resolution 90. Last year, she and her community had the experience that we expect to have this year when Operation Rescue comes to the Twin Cities. A lot of people at clinics which have already been bombed in one semi-amateurish or professional way or another are contemplating issuing flak jackets to doctors and nurses and so forth, and it sort of like a terror gripping our community.

And I don't think it has a lot to do with your stand on the issue of abortion, but it has a tremendous amount to do with something our colleague from Illinois, Paul Simon, said here in a recent markup. We happen to have different views on abortion, for example. He said, in essence, that instead of being paralyzed by conflict, people on both sides of this issue ought to find ways to work together and try to find out what progress can be made.

I sat this morning down in the new library here in Washington, DC, with Tony Hall and a group of people that are sort of praying for the city. One of the people said, "You know, there are an awful lot of people taking positions in this town. In fact, more positions are being taken in this city by powerful people than anywhere else, probably, in the world." And it struck me, as I contemplated the opportunity we were all going to have here today, that when we are dealing with legislation, everybody adopts a position.

And as I listened to my colleague, Barbara Mikulski, ask those very, very appropriate questions, I asked myself how can your position for or against the piece of legislation actually deal with the issue that our colleague challenged us to deal with.

I know that you have had some difficult positions, clearly, that the whole world has known about, that you have had to take, and it is not easy.

I would just, Mr. Chairman, urge my colleagues on this committee and my colleagues in the Senate to take a look at Senate Resolution 90 and to see if we can't persuade the Judiciary Committee

to move that out while we are contemplating what position is the most appropriate position to take on this bill. We ought all to express ourselves not only to those people in Minnesota who are anxious to know where the so-called decisionmakers in this community stand, but to the people of America on how we feel about the issues that have been raised regarding violence.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Wellstone.

Senator WELLSTONE. Mr. Chairman, I'll yield to Senator Simon because he has to leave shortly.

The CHAIRMAN. Senator Simon.

Senator SIMON. I thank the Senator, and I am just going to take a minute, Mr. Chairman, if I may.

First, on Senator Coats saying he would prefer this being before the Judiciary Committee, we have five members of the Judiciary Committee on this committee, so——

Senator COATS. I just said I wished I didn't have to deal with it because I don't feel adequate to get into the nuances of the legislation, and I would appreciate the Judiciary Committee's input. But I do respect those who are members and their knowledge.

Senator SIMON. I fear that if you were suddenly a member of the Judiciary Committee, it would not add to your wisdom or ability to deal with this. [Laughter.]

Second, to my colleague from New Hampshire, on labor law, we had a hearing before you were a member of the Senate where labor and management testified on the whole question of federalizing the question on strikes, and no one could cite a single instance where there was a problem where State and local governments couldn't handle it well; so there was no point in federalizing that kind of a crime.

And then, finally, I think we want to make sure that intimidation, the question that has been raised here, does not prohibit free expression. I think it is taken care of on pages 10 and 11, where we say "Nothing in this section shall be construed or interpreted to prohibit expression protected by the first amendment to the Constitution." But if that is not adequate, then let's look at an amendment that you may offer. But I think that should protect us in this situation.

And on the pro-life situation, if we face a situation where there is violence to pro-life headquarters, and we need to send a signal from the Federal Government, I'll join you in sponsoring such legislation. Right now, that is not a problem.

Thank you, Mr. Chairman, and I thank the Attorney General for coming here into the sweetness and light of the Labor and Human Resources Committee. And I thank my colleague Paul Wellstone.

Senator WELLSTONE. You are welcome.

Well, Mr. Chairman, unlike Senator Mikulski, I have never been involved in any protests, so I don't know anything about that. [Laughter.]

But I do have the same concern about the rules that we live by in a democracy, which are first amendment rights; I think all of us do.

I want to just add one other point in response to Senator Gregg's concerns, which I thought were interesting concerns on the labor

front. We have had the NLRB set up for years. We have Federal legislation already passed. We have a framework. And with respect to health care institutions, we have special provisions that make sure that in fact people are not blocked going into those health care institutions in our labor laws.

So one of the reasons that it is not part of this legislation, Attorney General Reno, is that we already have that Federal framework, which I think may add to this discussion that we are having today.

I just want to bring this back to Operation Rescue, which Senator Durenberger spoke about in Minnesota, and I do think it is important that you have both a Republican Democrat, and I think people have different views on this question, and I think there are powerful moral claims on all sides. But I think where there is common ground is that we do not want to see a continuation of the kind of violence that we have seen.

I just want to point out to make this very concrete that much of this, I suppose, if someone has trouble with the language, we want to get it right the first time, but that's what judicial review is all about; ultimately, this gets resolved in the courts. We want to get it right the first time, but I mean, you can pick and pick and pick away at this.

The point is this. Gerry Rasmussen works with the Midwest Health Center in Minneapolis, and this is a perfect example, Senator Mikulski. She has for years received threatening phone calls. She has had a brick thrown her window with the note, "Stop killing babies." She has had to conduct antiterrorist training with her employees. I mean, this has been going on for years. Now, Operation Rescue comes to the Twin Cities, and we are all very concerned.

So I only have one question—and I support your leadership, I appreciate your leadership. I am not arrogant about this. I know how strongly people feel on both sides. But I spoke at the service for Dr. Gunn here in Washington, DC., and I made a promise to myself that as a Senator from Minnesota, I would do whatever I could to try to make sure this does not happen again. I know that many, many, many—the vast majority—of pro-life people feel the same way. So I think there will be strong support for this piece of legislation, and I hope we can move on this very quickly.

Could you explain just in a concrete way how this legislation really could make a different for people in Minnesota who are so worried about what might happen with Operation Rescue this summer? What is the protection? How is it really going to work on the ground?

Attorney General RENO. I can't talk specifically about it, but what I can say is that if this legislation is passed, what I hope will happen, and certainly will happen from our point of view, is that Federal agents will work with local law enforcement, not superimposing their opinion, but supplementing, working with, and forming a real partnership to share information about what we can develop about such activities around the Nation, about what can best be done to deal with the situation, perhaps in terms of negotiation up front to avoid it from happening, to work it out, to solve the problem, if we understand tactics that are in place that would be a violation of this Act, to see what can be done in terms of civil actions to obtain an injunction, to set the ground rules through

Federal court action, to avoid the violence for the future. There is so much I think that can be done by developing that partnership and using Federal resources to support and assist local law enforcement wherever possible, to provide for the exchange of information, and to provide the remedies.

Senator WELLSTONE. Well, I thank you. And I just want to say to Senator Coats, because I listened very carefully to what he said about his concerns—and Senator Gregg—that I really hope that we can unite behind this legislation—and maybe it will have to get a little better—because that is what we are faced with in Minnesota, and I know you don't want to see that, and I believe what the Attorney General just said about the difference that this could make is the very reason why I really hope this will command widespread support. I think this is ultimately what the issue is not just for Minnesota, but for our country.

Senator COATS. Would the gentleman—the Senator—yield for just a moment?

Senator WELLSTONE. If you keep calling me "gentleman," I will yield.

Senator COATS. I appreciate the comments that several members have made in this regard, and I want to again State for the record that I do not condone force, threat of force, intimidation which leads to injury. I don't think any of us want that. We do have a serious problem here, and no one wants to condone that. If we can pass appropriate legislation which will strengthen the laws and prevent that kind of thing from happening in the future, I think we ought to do that.

I have some what I think are legitimate questions relative to some of the language here, particularly the phrase, "by physical obstruction which attempts to intimidate." I don't know what that means. When I think of examples of what I thought was legitimate protest, whether it was the civil rights movement, the pro-nuclear movement, other movement, those acts which may have violated a statute or may not have, I see the potential for an overly aggressive law enforcement/judicial apparatus to use that language to do some things which I don't think anybody on this panel would support.

And I want to try to define that, understand that, and construct that in this legislation so that we don't find ourselves having problems later on.

Second, I have concerns about the equality of the penalties as they apply for identical acts. An identical act in a protest for civil rights, or environment, or whatever to an identical act in a pro-life protest it seems to me ought to have an identical judicial response. And that is not the case with this legislation as it is drafted, I don't think, and I'd be happy to work with the chairman to try to understand that better.

And finally, let me just say——

Senator WELLSTONE. You've taken all my time; do you know that?

Senator COATS. I thought you were through.

The CHAIRMAN. We're in a warm mood now.

Senator WELLSTONE. That's right.

The CHAIRMAN. Go ahead.

Senator COATS. Well, we don't get the Attorney General before us very often. I think we have a conduct here that we are all trying to find a way to successfully eliminate, if not minimize, through legislation. If we can do that without polarizing, then I think we have a common objective. It's just that I think those are legitimate concerns, and I would like to pursue those concerns, and I think there is vagueness and so forth in the language——

Attorney General RENO. My understanding, Senator, as I told you before, is that the statutory construction is the same. Staff has confirmed, and we will double-confirm when we get back to the Department of Justice, that 18 U.S.C. 245, which relates to interference with Federal rights because of race, has identical penalties and identical statutory language. But we will look at it again, because I am very committed and very sincere to doing what I talked about with Senator Kassebaum, which is addressing these issues and trying to come up with the best product possible.

Senator GREGG. Is "physical obstruction" one of those words, too?

Attorney General RENO. I don't have the exact language here with me, but we will——

Senator COATS. Well, I appreciate your willingness to do that and look forward to it.

And then finally, just for the record—and I don't mean this to be equivalence, because there isn't equivalence here—but there are acts against those who support the pro-life position that have taken place—I have a list of them; in fact, in my own State, in South Bend, IN, an abortion rights demonstrator was arrested after spitting on a Catholic priest during a protest, and other abortion rights activists rallied outside a Catholic church where one of our colleagues, Representative Hyde, was speaking, and people set off a smoke bomb inside the church lobby, and the perpetrator was released after posting a $100 bond. There have been fire bombings of pro-life facilities, and there have been physical assaults.

I just did not want to leave the record that there were no incidents on the other side, and that was the basis for my question as to whether or not this language would apply equally to similar acts against those who are advocating a different position.

Attorney General RENO. The Act would not apply as it is drafted. But again, if there is a problem, we would certainly address it.

Senator COATS. Well, I look forward to working with you on that.

Thank you, Mr. Chairman and Senator Wellstone.

Senator WELLSTONE. Mr. Chairman, I'll just take 20 more seconds.

I appreciate the questions that both Senators have raised. I believe the Attorney General has tried to respond, and I think if you look at the language, some of your concerns are already met. I understand you raised them in good faith. Let me just make a request to you in good faith as well, which is that we are this summer facing this situation. We just can't continue to have these "Wanted" signs and a repeat of what happened to Dr. Gunn, and violence against women who are exercising their constitutional right. So if I could just get the Senator's attention, I am very sympathetic to the questions you have raised; I just hope that after some of the questions that you have raised have been answered that we won't on this piece of legislation see delay and delay and delay and delay,

where Senators will keep saying they have concerns, that "I'm for it, but I have concerns; I am for it, but I have concerns"—like trying to dance at two weddings at the same time—to the point where we won't pass this legislation, because we need this protection, and we need to stop this kind of violence.

Senator COATS. No. In response——

Senator MIKULSKI. Mr. Chairman.

Senator COATS. —I am anxious to move forward. But let me just point out that the "Wanted" signs work both ways. This is a "Wanted" sign for Cardinal Mahoney for protesting in front of the——

Senator WELLSTONE. I'm talking about——

Senator MIKULSKI. Mr. Chairman, the conversation between Senators is interesting, but——

The CHAIRMAN. I agree.

Senator WELLSTONE. I was just trying to get back to my time.

Senator COATS. Are you sure you agree that it's interesting, Mr. Chairman?

Senator MIKULSKI. I do.

The CHAIRMAN. Well, I don't know. Have you about wound up?

Senator WELLSTONE. I'm finished.

Senator MIKULSKI. Could we continue to keep the Attorney General for our conversation?

The CHAIRMAN. All right. Let me just wind up. I think all of us know that issues that relate to the Constitution are enormously complex. We had a civil rights bill that was held up for 2 years on the differences between "essential," "substantial," "manifest," and "significant"—those four words. So it isn't that words aren't important, I want to tell our good friend from Indiana; they are enormously important, and they need a lot of study and a lot of attention and a lot of reading of cases. And I think all of us who have been dealing with similar kinds of constitutional issues on this committee and others welcome the opportunity to work with our colleagues. I say that very sincerely, and in any event, I apologize for misstating the Senator's position. I think one could have assumed by the nature of the questions that one might have reached that conclusion. But I hope the record will reflect what is the Senator's statement, and my apologies for that.

Senator COATS. Thank you, Mr. Chairman.

The CHAIRMAN. But I think what you have, Senator, is a desire by the Attorney General to work with you and with other members of the committee, and I don't doubt the basic and fundamental integrity of any member of the committee with regard to the approach to that question.

We thank you. Aren't you glad you are Attorney General?

Attorney General RENO. I'll be glad if you'll allow me to speak for 30 seconds.

The CHAIRMAN. Please.

Attorney General RENO. Senator Durenberger said something that I think is important. I was at a rally this past Saturday in Rockville, MD, Voices Against Violence. And somehow or other, we have got to work out in America the issues that confront us without violence. And I would hope that everybody concerned with this issue would begin here, along with so many other places, to know that we can resolve disputes and disagreements without violence.

The CHAIRMAN. Well, this Senator will say "Amen" to that. Thank you very much.

Our first panel of witnesses this morning consists of three witnesses. The first two are a physician and a clinic administrator who have directly experienced in different ways the kinds of conduct that the legislation before us today addresses. The third is an official of a small town that has attempted to deal with massive antiabortion blockades and knows first-hand the difference that a Federal court injunction can make.

Dr. Pablo Rodriguez is a physician from Rhode Island, board-certified in obstetrics and gynecology. In addition to his private practice, he serves as medical director of Planned Parenthood of Rhode Island and practices several days a week at the Planned Parenthood clinic in Providence.

Dr. Rodriguez, we are pleased to have you join us today.

Willa Craig is the executive director of the Blue Mountain Clinic in Missoula, MT. Blue Mountain Clinic offered a wide range of health care services to the people of western Montana until it was destroyed this past March by arson.

Ms. Craig, we are glad to have you here.

David Lasso is city manager of Falls Church, VA. Falls Church was the site of some of the clinic blockades that gave rise to the Bray case decided earlier this year by the U.S. Supreme Court, in which the Court ruled that certain existing Federal laws do not cover antiabortion blockades. Mr. Lasso as city attorney was directly involved in the effort of his city to punish and prevent this conduct.

We thank you very much for joining us, Mr. Lasso.

Dr. Rodriguez, if you would start off, please.

STATEMENT OF DR. PABLO RODRIGUEZ, MEDICAL DIRECTOR, PLANNED PARENTHOOD OF RHODE ISLAND, PROVIDENCE, RI; WILLA CRAIG, EXECUTIVE DIRECTOR, BLUE MOUNTAIN CLINIC, MISSOULA, MT; AND DAVID LASSO, CITY MANAGER, FALLS CHURCH, VA

Dr. RODRIGUEZ. Good morning, Mr. Chairman, distinguished members of the committee and guests. Special thanks to Senator Pell for such gracious words at the beginning of the hearing.

My name is Pablo Rodriguez, and I am clinical assistant professor of obstetrics and gynecology at Brown University Medical School. I am a fellow of the American College of Obstetricians and Gynecologists. I have a private practice in gynecology, and I am also medical director of Planned Parenthood of Rhode Island in Providence.

The reason I am here today is to share with you my experiences as a physician who performs abortions, and as a father of two young children, ages 2 and 4.

Over the last few weeks, the debate over abortion has escalated to the ultimate level of violence with the death of our colleague Dr. David Gunn in Pensacola, FL. This was the inevitable result of an intensifying national campaign targeting physicians as the focus for harassment, in order to intimidate us from continuing to provide our patients with a legal alternative to an unintended pregnancy.

You will hear today very reasonable-looking people, eloquently trying to convince you that the death of Dr. Gunn was an aberration, an isolated incident created by one sick individual. They will embrace the Constitution and the right to free speech in order to justify the defeat of the legislation before you.

The other advocates for the "Freedom of Access to Clinic Entrances Act of 1993" and I will clearly demonstrate by our personal experiences that we are in the midst of an epidemic of violence against providers and patients of reproductive health clinics that threatens many more lives. This epidemic has been quantified in the past by Dr. David Grimes, who published in November of 1991 an article that documented 110 cases of arson, fire bombing or bombing dating back as far as 1977. I would like to introduce for the record of copy of this article, which was published in the American Journal of Obstetrics and Gynecology, Volume 165, Number 5, Part 1. It is called "An Epidemic of antiabortion Violence in the United States."

[The document referred to follows:]

American Journal of Obstetrics and Gynecology
Founded in 1920
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CLINICAL SECTION

Clinical Opinion

An epidemic of antiabortion violence in the United States

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Los Angeles, California, New York, New York, and Washington, D.C.

From 1977 to 1988, an epidemic of antiabortion violence took place in the United States, involving 110 cases of arson, firebombing, or bombing. The epidemic peaked in 1984, when there were 29 attacks. Nearly all sites (96%) were clinics that provided abortions. Facilities in 28 states and the District of Columbia were involved. The national rate of violence was 3.7 per 100 abortion providers and 7.2 per 100 nonhospital abortion providers. The national ratio of violence per 100,000 abortions performed was 0.6. Arson was both the most frequent (39% of all cases) and the most damaging (mean cost $141,000) type of violence. The epidemic appears partially attributable to multiple point-source outbreaks of violence caused by small numbers of individuals or groups. Thirty-three persons have been convicted to date. Vigorous prosecution of perpetrators and the reemergence of clinics after damage probably helped to curb the epidemic. (AM J OBSTET GYNECOL 1991;165:1263-8.)

Key words: Abortion; abortion, induced; abortion, therapeutic; abortion providers; violence

Harassment and intimidation of providers of abortion services have become widespread in the United States. For example, 47% of abortion providers experienced at least one type of antiabortion harassment in 1985.[1] These activities have ranged from jamming of telephone lines to picketing the homes of physicians to vandalism.[2] In recent years, however, the controversy over abortion has taken a destructive turn, resulting in an epidemic of antiabortion violence across the United States. Since 1977 >100 attempted or completed arsons and bombings have caused millions of dollars of damage and disrupted the provision of health care to large numbers of women. Because this epidemic of violence directed against health care providers is unique in American medicine and because its medical and social implications are profound, we conducted this study to characterize the epidemic.

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611/130674

Material and methods

We defined a case of antiabortion violence as an attempted or completed act of arson, bombing, or firebombing directed against an abortion provider or an organization supportive of abortion rights. Cases were identified through the ongoing surveillance of the National Abortion Federation, with the assistance of the United States Bureau of Alcohol, Tobacco and Firearms. Through interviews with the victims and collaboration with law enforcement officials, we determined the date of the occurrence, the city and state, the name and type of facility or organization, the type of violence committed, the estimated damages, and whether a perpetrator was convicted. This report covers episodes of antiabortion violence from Jan. 1, 1977, to Dec. 31, 1988.

We characterized the epidemic by time, victim, and place. We also examined the acts of violence by type and destructiveness. To portray the "vectors" of this epidemic, we also reviewed the convictions of the perpetrators. We calculated the frequency of antiabortion violence by state using three different denominators: the number of abortion providers, the cumulative number of abortions performed in each state from 1977 to 1988, and the estimated number of women aged 15 to

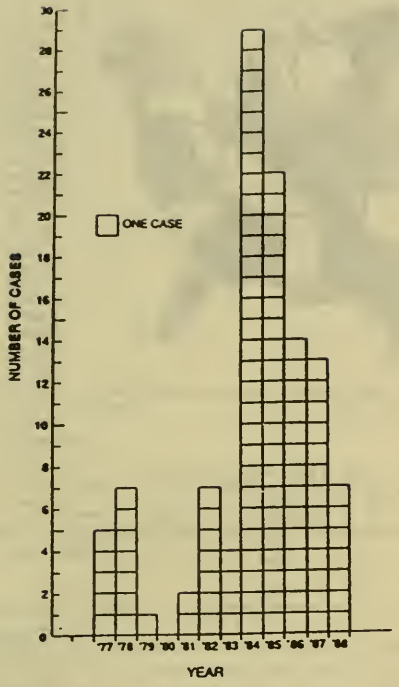

Fig. 1. Cases of antiabortion violence by year, United States, 1977 to 1988.

44 years in each state as of July 1, 1982. Numbers of providers and abortions by state were obtained from surveys by the Alan Guttmacher Institute,[8,9] with the exceptions of the years 1983 and 1986. Since the institute did not conduct a survey for those years, we used the average number of abortions for 1982 plus 1984 for 1983 and 1985 plus 1987 for 1986. Estimates of the numbers of women of reproductive age (15 to 44) by state for 1982 were obtained from the United States Bureau of the Census.[9] This year was in the middle of the study interval and was selected as a standard for comparison.

To examine the risk of antiabortion violence by type of provider, we calculated violence rates per 100 providers and violence ratios per 100,000 abortions performed. We also sought to identify clusters of cases, which would suggest a common source. For the purposes of this analysis we defined a cluster of cases [illegible] two or more cases occurring in the same calendar month in the same state or in a contiguous state.[10] We also examined the correlation between attack rates and percentage change in the number of abortions by state.

Results

From 1977 to 1988, 110 cases of antiabortion violence were identified. The epidemic peaked in 1984, with partial resolution of the epidemic in subsequent years (Fig. 1). Twenty-nine cases occurred in 1984, which was four times the number in any preceding year. One percent of all abortion providers in the United States were targets of attempted or completed arson or bombing in 1984. The ratio of violence in that year was 1.8 episodes per 100,000 abortions.

The targets of antiabortion violence were almost exclusively health care providers. One hundred eight cases (98%) involved providers, whereas the other two victims were organizations related to abortion rights. In July 1984 the office of the National Abortion Federation in Washington, D.C., was damaged extensively by a propane bomb. In November 1984 the Washington, D.C., office of the American Civil Liberties Union was bombed while an employee was present. This attack was classified as abortion related, since the group that bombed the ACLU was convicted of attacking the National Abortion Federation and a number of clinics.

Nonhospital providers (clinics and physicians' offices) were the only providers attacked (Table 1). A total of 80 different facilities were attacked, 20% more than once. Nine were attacked twice, three facilities three times, three facilities four times, and one facility five times during the study interval. The number of attacks among these 80 providers was 1.4 ± 0.8 (mean ± SD).

Antiabortion violence was committed from coast to coast (Fig. 2). Twenty-eight states and the District of Columbia experienced one or more episodes. The largest number of cases occurred in Ohio ($n = 16$), followed by California ($n = 10$), Texas ($n = 9$), and Florida ($n = 8$). However, the highest rate of violence per 100 nonhospital providers occurred in Minnesota, followed in decreasing order by Delaware, Ohio, and North Dakota. Violence ratios (number of cases per 100,000 abortions performed) were highest for Vermont, followed by Oregon, Minnesota, and North Dakota (Table II). The national ratio from 1977 to 1988 was 0.6 cases per 100,000 abortions.

Violence levels by size of state revealed a different pattern. The highest ratios of violence in the 1977 to 1988 period per million women of reproductive age in 1982 were seen in the District of Columbia (17.8), followed by Vermont (15.7), Oregon (11.0), and Minnesota (7.1). The national ratio was 2.0 cases per million women of reproductive age.

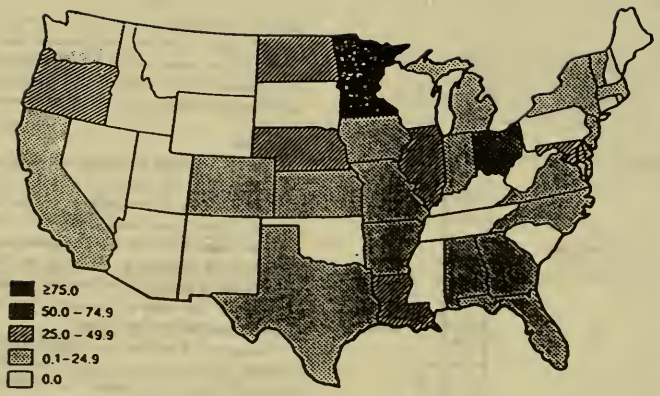

Fig. 2. Rates (number of cases per 100 nonhospital providers) of antiabortion violence against nonhospital providers, by state, United States, 1977 to 1988.

Table 1. Rates of antiabortion violence against providers, by type, United States, 1977 to 1988

Type of provider	*No. of attacks**	*No. of providers†*	*Rate‡*
Hospital	0	1405	0.0
Nonhospital	108	1503	7.2
Total	108	2908	3.7

*Excludes two attacks against multiproviders.
†As of 1982.
‡Number per 100 providers.

Between 1977 and 1988 the number of abortions in the United States increased at an average annual rate of 1.9%. In those areas that had experienced violent attacks against abortion providers, the average annual increase was 2.0%, compared with 1.4% in other states. The correlation between the proportion of abortion providers subject to violent attacks over the 1977 to 1988 time period and the percentage change in the number of abortions between 1977 and 1988 was not significant.

The clustering of episodes both temporally and geographically suggests that the epidemic can be partially explained as multiple point-source outbreaks. Eighteen clusters of cases accounted for 41% of all episodes of antiabortion violence. Forty-five cases were clustered in groups of two to four episodes in the same month in the same locale. Convictions of perpetrators support the multiple point-source outbreak explanation. Several individuals and groups were convicted of multiple acts of violence. Fifteen individuals or groups (total of 33 persons) have been involved with 42 separate cases (38%). The mean number of cases accounted for by these 15 "vectors" was 2.8, with a range of 1 to 10.

Those convicted were implicated in 8 of the 18 clusters identified epidemiologically, leaving 10 clusters without convictions. One suspect has been indicted on charges related to two arsons but has remained a fugitive because of failure to appear at sentencing on unrelated charges. Two other perpetrators confessed but were not convicted; one was declared incompetent to stand trial and was committed to a state mental institution, and the other was found not guilty by reason of insanity.

The nationwide conviction rate was 39%, although rates varied widely from state to state. All cases resulted in conviction of the perpetrators in the District of Columbia, Maryland, Virginia, Delaware, Indiana, Louisiana, and North Dakota. Some states with large num-

Table 11. Ratios of antiabortion violence by state, United States, 1977 to 1988

State	No. of cases of violence*	No. of abortions performed (×1000)	Ratio†
Vermont	2	42	4.8
Oregon	7	189	3.7
Minnesota	7	219	3.2
North Dakota	1	33	3.0
Ohio	16	705	2.3
Delaware	1	53	1.9
Louisiana	4	218	1.8
Arkansas	1	69	1.4
Maryland	5	362	1.4
Nebraska	1	77	1.3
Washington	5	392	1.3
Florida	8	889	0.9
Iowa	1	107	0.9
Illinois	7	825	0.8
Texas	9	1,171	0.8
Virginia	3	395	0.8
Kansas	1	153	0.7
Alabama	1	220	0.5
Indiana	1	190	0.5
Colorado	1	266	0.4
Georgia	2	447	0.4
Michigan	3	750	0.4
Missouri	1	232	0.4
California	10	3,269	0.3
District of Columbia	1	329	0.3
New York	6	2,246	0.3
Massachusetts	1	497	0.2
North Carolina	1	402	0.2
New Jersey	1	713	0.1
United States	108	18,395	0.6

*Excludes two attacks against nonproviders in the District of Columbia.
†Per 100,000 abortions performed.

bers of cases (Ohio, Oregon, and Texas) failed to convict any perpetrators.

Arson was the most frequent type of violent act. Arson and attempted arson were involved in 39% and 13% of cases, respectively. Bombing (21%) and attempted bombing (15%) were next in frequency. These included one chemical bomb, one propane bomb, one pipe bomb, and one package bomb designed to explode on opening. The package bomb was intercepted at the clinic, and postal officials were notified. Similar packages were found at the local post office addressed to three different clinics. Firebombing (10%) and attempted firebombing (3%) were the least frequent types of violent acts.

Violence involving fire caused more extensive damage than did violence involving explosion. The estimated damages from arson were known for 37 of the 43 cases; the total losses were $5,215,500 with a mean ± SD of $141,000 ± $273,700 per case. Damage estimates were available for 7 of the 11 firebombings; the total losses were $890,000, with a mean ± SD of $127,100 ± $108,600 per case. Similar data were available for 22 of the 23 bombings; the total losses were $1,501,000, with a mean ± SD of $68,200 ± $70,000 per case. The twofold difference in damages between incendiary and explosive devices is likely an underestimate; several arsons totally destroyed the building, and no replacement value was available. The single most expensive act of violence occurred in Texas in February 1985, when a gasoline-ignited fire destroyed an entire shopping center valued at $1,500,000 and injured two firefighters.

Comment

One definition of an epidemic is an "unusually frequent occurrence of disease in the light of past experience."[7] By this definition any act of arson or bombing directed against a health care provider or related organization constitutes an epidemic. The epidemic of antiabortion violence in the United States from 1977 to 1988 was a social phenomenon without precedent. To our knowledge this epidemic was the first time in our nation's history that health care providers have been singled out as targets of violence in pursuit of a social agenda. Other controversial areas of medicine, such as life-support systems, organ transplantation,

blood banking, and in vitro fertilization, also may be in jeopardy.

Harassment and violence have become part of a strategy of some antiabortion elements; the dramatic increase in violence seen in 1984 has been attributed to their growing frustration by their failure to overturn *Roe v Wade* and prohibit abortions.[2]

This frustration was intensified in the summer of 1983 by three factors. The first was a forceful reaffirmation by the United States Supreme Court of a woman's right to abortion and a rejection of restrictions that would limit access to abortion *(City of Akron v Akron Center for Reproductive Health, 103 S Ct 2481)*. The second was the United States Senate's rejection of a constitutional amendment that would allow states to prohibit abortion. The third was the Senate's earlier tabling of the human life statute, which would allow Congress to bypass the constitutional amendment process and to prohibit abortion by another mechanism. These setbacks were difficult for some abortion opponents to accept, given the expectations occasioned by the election of Ronald Reagan to the presidency. Some of the more radical elements gave up hope for judicial or legislative change and instead embarked on a militant course of action.[2]

Several factors probably helped to curb the epidemic. One was vigorous investigations by local and federal law enforcement agencies, notably, the Bureau of Alcohol, Tobacco and Firearms. The bureau has primary responsibility for federal gun control, explosives control, and antiarson laws. Arrests and convictions may have deterred others. The most severe sentence has been 30 years and the most severe fine $353,000. Thirty-year sentences were given to two men purporting to be members of a radical antiabortion group known as the "Army of God"; they were convicted of attacks against three abortion clinics and the kidnapping and extortion of a physician. In addition, most facilities that were attacked did not close permanently, so that the disruptions were temporary.

Clinics were the principal targets of antiabortion violence. This finding is consistent with the observation that clinics also are the chief targets of harassment.[1] A survey of providers revealed that several factors were significantly related to harassment: type of facility (e.g., clinic vs physician's office), region of the country (higher in the Midwest and South), and proportion of patient visits that involved abortion services. Factors not associated with the likelihood of harassment included number of abortions performed beyond 400 per year, recent change in number of abortions performed, maximum gestational age at which abortions are performed, and cost of the procedure.[3] Clinics provide the majority of abortions in the United States and are both visible and vulnerable. Unlike hospitals, which are open for business around the clock, clinics have long periods of time when they are vacant and accessible to attack.

Some states had a disproportionate amount of antiabortion violence. These included both populous states such as Ohio and less populous states such as North Dakota. Delaware, Minnesota, North Dakota, Ohio, and Oregon consistently ranked high in frequency of violence when analyzed according to the number of nonhospital providers, number of abortions performed, and population of women of reproductive age. The District of Columbia had a disproportionately high violence ratio per million women of reproductive age because it has a relatively small population but serves as a referral center for abortion services.

The true cost of this epidemic is hard to estimate. As noted, the direct cost of $7.6 million is a substantial underestimate because of the exclusion of a number of facilities that were completely destroyed. The related costs of increased expenses for legal and security services, increased fire and casualty insurance, new licensing requirements, and staff recruitment have not been estimated but are large. In addition, the indirect costs of time lost from work during repair and reconstruction are substantial. Patients seeking abortion or other services were forced to postpone care or transfer to another provider. The cost of investigation, prosecution, and incarceration of perpetrators also is large. These costs may translate into higher fees for patients and rising costs of law enforcement.

Even though the costs of this epidemic have been great and some facilities have had to interrupt or discontinue providing abortion services, the violent attacks have not led to fewer women having abortions. There is no statistically significant relationship between the change in the number of abortions between 1977 and 1988 and the levels of violence among nonhospital providers.

This epidemic of antiabortion violence represents a minority of the hostile acts against abortion providers during the study interval. Between 1977 and 1988, the following incidents were reported to the National Abortion Federation: clinic invasion, 222; clinic vandalism, 220; bomb threats, 216; death threats, 65; assault and battery, 46; burglary, 20; and kidnapping, 2. The actual number of hostile acts may be substantially higher, because these figures reflect only voluntary reports.

The majority of United States citizens oppose violence against abortion facilities.[4] Clearly, the public suffers from this violence, which is sometimes indiscriminate. For example, a Planned Parenthood Clinic in Georgia was attacked by a firebomb in September 1984; the clinic does not provide abortions but, rather, counseling and contraception that help to avoid the need for abortion.

Abortion will likely remain one of the most contro-

versal social issues of our time. Arson, bombing, and millions of dollars of damage to health care facilities have neither contributed to the debate over abortion nor decreased the numbers of abortions performed. Sex education, personal responsibility, and better contraceptive practices will help to reduce the need for abortions; Molotov cocktails will not. When this is understood, the epidemic of antiabortion violence may finally end.

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Dr. RODRIGUEZ. All I will ask you to do is to walk just a few yards in my shoes and feel what thousands of health care providers across the country feel every day of their lives.

As I stated earlier, over the last few months, a national campaign called "No Place to Hide" has been launched against providers all over the country. There are manuals and training camps for the perpetrators of this campaign that use fear as their main weapon. As medical director of Planned Parenthood of Rhode Island, I was not surprised to find out that I and my clinic would be targets.

In the beginning, the harassment was the usual nasty letter and graphic pictures of dismembered fetuses, but slowly it became more aggressive. I began receiving strange packages with dolls inside, as well as subscriptions to gun magazines and hunting lodges, showing pictures of dead animals hanging by their extremities.

Then, the "Wanted" posters began to appear, and since one has already been introduced, I would like to show you and introduce my poster as well—one of many.

The first one of these posters was taped to the front door of the clinic for patients to see. Copies of this hideous poster were also sent to my wife at home and to my office. Then the doors and locks to our clinics were glued on multiple occasions, culminating with three episodes of forceful blockading of our clinics. During one of the invasions, the police failed to arrest anyone, and when arrests were finally made, the fines were minimal, and there were no jail sentences given. This is in spite of the fact that many of the offenders had previous arrests for the same offenses.

The day Dr. Gunn was shot, I knew that my life would irrevocably change. One week after his death, as I was driving my mother to the bus station, I realized that my car was steering poorly. Once I had dropped her off, I examined my tires and found that there were 45 nails deeply embedded in them—a fortunate finding considering that I was driving over 50 miles an hour on the highway. That evening when I returned home, still unaware of the location of this act of vandalism, my wife painfully discovered, with her foot, that my driveway was booby-trapped with roofing nails cleverly buried under the snow. An image of my young children running and skinning their knees on that same section of driveway has filled my heart with a fear that until this day I have not been able to shake off.

The response from the police in my community was that they could not help, and in view of the events in Florida, they recommended a bulletproof vest. Since then, a day does not go by that somebody does not feel my ribs to see if I am wearing one.

The following week, I received a bill for an insurance policy on my wife's life. I contacted the insurance company, who merely stated that somebody filled a fraudulent application, and again, they could do nothing about it except to apologize.

Most recently, I received an ID card for a catastrophic health and dismemberment policy that would cover my medical costs in case the circumstance should arise. All of this, courtesy of those who call themselves "pro life."

Even as I was preparing for this hearing, I became aware of an incident in front of our clinic. The other day, an individual drove

up to the protesters outside and screamed, "I am pro-life, and I have a gun, and you could use it to kill the doctor in here."

My experiences are not unique. Other providers throughout the country have been victims of similar attacks. Clinics have been burned, shot at, vandalized, and their patients and staff have been traumatized, all in the name of life.

Dr. Buck Williams, the only physician in South Dakota who provides abortion services, stated during an interview, "There are ugly phone calls, death threats, and one of the reasons I can keep doing this is that my kids have grown up. It's a lot harder for someone with small children. Who knows how the family is going to be affected?"

Well, I have small children, and I can tell you that the hardest day of my life was the day that I had to explain to my son Kiko, now 4 years old, why someone put nails across the driveway for his mom and dad to step on. I also had to explain to him that someday he may hear bad people saying terrible things about his dad, and that we were not safe in our home because these bad people do not like the way his dad helps patients.

For most children, the end of innocence occurs when they discover that Santa Clause does not exist. For Kiko Rodriguez, the end of innocence was forced upon him by these very "responsible" citizens that claim to protect life.

The results of this intimidation campaign are plain to see. Abortion may remain a legal option in this country, but there will be so few providers that access will become limited and in some cases, unavailable. In 34 States, the number of physician providers declined between 1985 and 1988, according to the 1992 edition of the Alan Guttmacher Institute Abortion Fact Book.

A survey published this year in Obstetrics and Gynecology, our specialty journal, demonstrated that only 7 percent of resident physicians in this country spend more than 10 days at an abortion facility during their training. Only 45 percent of residents in obstetrics and gynecology have any degree of experience in first trimester abortions, and a mere 19 percent have experience in mid-trimester procedures.

Our patients are the ones who suffer. Women who do make it in have a heightened level of anxiety and a greater risk of complications. The delay caused by the invasions has forced some patients to seek care elsewhere due to the fact that their gestational age has gone beyond the first trimester. The risk to these women is unnecessarily increased.

These assaults also interfere with the entire range of reproductive health services that we deliver, including contraception, general gynecology and treatment for sexually-transmitted diseases.

It is obvious that we need this legislation protect the health and safety of our patients, staff, and our families. Previous experience in various States has shown that we sometimes can't depend on local authorities. Good examples would be the sheriff of Corpus Christi, TX, James Hickey, who testified that he would not enforce trespass laws against invaders; and Mayor James Griffin of Buffalo, NY, who welcomed protesters to his city to the tune of $250,000 in police costs. In the city of Providence, RI, where our clinic is located, Mayor Cianci has made no effort to bring an end

to the escalating violence which now extends to Planned Parenthood's executive director, staff, volunteers, and patients. The Providence police have never charged blockaders—even repeat offenders—with trespassing. Rather, they have invoked a city ordinance called "failure to move."

Reasonable people disagree over abortion. However, it is unreasonable to use force or fear to intimidate providers and patients from exercising those rights guaranteed by the Constitution. It is unreasonable that physicians are discontinuing the provision of a needed medical service simply out of fear. It is unreasonable that my children are not allowed to play in our own yard because it is not safe.

Most of the people in this room will deliberate about this issue for a few hours, days, or maybe even weeks. In the end, however, you will all return to your normal lives. For us, the providers of this legal option for women, the abortion debate permeates every minute of our lives simply because, as the name of the campaign says, we have "no place to hide." We have no place to hide from the vandals who destroy our property. We have no place to hide from the threats on our lives, and we have no place to hide from the fear that grows within us and rules every minute of the day and night.

We do have a place to turn to, however, and that is the Congress of the United States. It is your duty to protect law-abiding citizens from the threat of those who take the law into their own hands. Regardless of where you stand on the abortion debate, all of you, by virtue of your positions, must stand for law and order.

On behalf of my family, staff and patients, I urge you to recommend passage of this important and timely legislation.

Thank you.

The CHAIRMAN. Thank you very much.

Ms. Craig.

Ms. CRAIG. Good morning, Mr. Chairman and members of the committee. My name is Willa Craig, and I am the executive director of Blue Mountain Clinic in Missoula, MT. I am pleased to have this opportunity today to talk with you on behalf of the staff, the patients, and the abortion providers of the State of Montana with regard to our support for Senate bill 636.

Blue Mountain Clinic is a private, nonprofit family health care facility founded in 1977. Our clinic until recently provided a wide variety of services to our community and outlying areas. We have an internal medicine practice that serves men and women and focuses on prevention and treatment of illness. We represent all aspects of women's health care, including first trimester abortion, prenatal care and delivery, diagnosis and treatment of sexually-transmitted infection, and all available contraceptive options.

The clinic's prenatal program is comprised of about 70 percent Medicaid patients, many of whom have difficulty obtaining obstetrical care. Our pediatrics program provides no-cost immunizations to low-income children under a contract with the State, in addition to well exams for children and adolescents.

Low-cost HIV testing and counseling is offered and is a crucial supplement, since availability to our local health department is limited.

The clinic's licensed counselor provides mental health therapy for a broad range of concerns. She is currently developing a practical model for therapy related to the adoption and relinquishment process, aimed at both birth mothers and adoptive parents.

Patients of Blue Mountain Clinic represent all age groups, from infants through the elderly. Montana is a vast State with a small population. This results in large areas where few medical providers can be found. For example, only 6 of Montana's 56 counties offer abortion services. A large number of our abortion and our prenatal patients travel an average of 120 miles to their appointments at our clinic due to lack of services in their own areas. These areas include Idaho, eastern Washington, Wyoming and Canada.

Our mission as a nonprofit is to make high quality health care affordable and available to western Montana's growing population of uninsured, working poor, and Medicaid/Medicare dependent citizens. And until recently, we were meeting that goal.

On March 29, at 4 a.m., our clinic and our ability to continue to serve the region was destroyed by an arsonist. I was asleep when I received the call from our security service, telling me that all of our alarm systems had been activated. As I approached the clinic, I saw fire trucks sealing off the block. Attempts were being made to contain the blaze that had by then spread throughout the building and broken through the roof.

The clinic was a total loss. I have photos that will illustrate this point for you.

This particular photo is of the rear of our wing of our facility. As you can see, we really didn't have a roof left on about a third of the building. The entire wing actually had to be levelled. There was nothing salvageable there.

The CHAIRMAN. No one was in the clinic at the time?

Ms. CRAIG. Fortunately, no. I had to caution staff against working late at night about a year ago.

The CHAIRMAN. So this was at night?

Ms. CRAIG. Correct.

The CHAIRMAN. What part of the clinic does that represent?

Ms. CRAIG. That is our rear entrance that would most commonly be used by staff.

The CHAIRMAN. And represents what—one-quarter of the clinic, or one-third of the clinic?

Ms. CRAIG. Probably about a third.

What you are looking at in this photo is one of our computer terminals and our electronic lab results transcenders.

The CHAIRMAN. What are those lab results used for?

Ms. CRAIG. A variety of things—our prenatal work; all of our chemical lab work that we send out-of-State comes to us electronically through that equipment.

This is a picture of our waiting room, looking toward the office. This particular area includes our lending library, and then the area where we have our children's playroom and lending library.

The CHAIRMAN. So the point is that it is a general health clinic serving primarily underserved people in a rather remote area of Montana.

Ms. CRAIG. That's correct, yes.

This is one of our prelim rooms that we use primarily in our prenatal services. This is a baby scale that was left on the counter.

This last photo is another photo of our waiting room, this time looking out toward the front of the building. The braces that you see there are not part of the original architecture; they had to be installed in order to keep the roof up while the fire investigation was being conducted.

The CHAIRMAN. I think it would be reasonable to say it is a total loss; is that correct?

Ms. CRAIG. Yes. It is literally gone.

Mr. Chairman, for the record, I would like to have these photographs submitted.

The CHAIRMAN. Fine. They will be included.

[Photographs follow:]

DESTRUCTION OF BLUE MOUNTAIN CLINIC BY ARSON, MARCH 29, 1993

Rear Entrance

Computer and Lab Fax Machine

Baby Scale in Room Where Pediatric Work Was Done

Waiting Room With Library and Kids Section

Waiting Room, Looking Out Front Windows

Ms. CRAIG. The subsequent investigation of our fire revealed that the fire had started in two separate areas of the clinic and bore similarities to a 1992 arson fire that extensively damaged a Planned Parenthood clinic in Helena. No arrests have been made in either case.

Since the fire, we have been able to re-establish only a small fraction of our previous services.

This act of devastating violence was the culmination of several years of escalating crimes against the clinic and its staff as providers of abortions. Although abortion comprises less than 20 percent of our total patient visits each month, this fact has not diminished in any way the overt hostility directed at us by antichoice protesters.

Throughout the clinic's existence, there have been picketers and staged protests of a peaceful nature at our clinic. Neither the administration of the clinic nor local law enforcement has ever sought to limit this type of first amendment protected activity.

For many years, the relationship between the clinic and its antiabortion protesters could be described as mutually tolerant. In the past 4 years, however, things have changed dramatically.

The CHAIRMAN. I'm going to ask you to just give some summary comments, if you would, because we want to hear from the other witnesses. Thank you.

Ms. CRAIG. Basically, since the fire that destroyed our clinic, incidents of violence and personal threats against the clinic staff have actually increased, not decreased, and I have for the record the National Abortion Federation statistics, which were compiled since 1977, regarding the extensive nature of violence directed against clinics like ours. They include the fact that we have documented 36 bombings, 81 arsons, 327 clinic invasions, 84 cases of assault and battery, 563 clinic blockades, and 457 incidents of vandalism.

I wish to submit those for the record with permission.

I would also like to State that in Montana, we have a history of being self-reliant, and we are naturally and sometimes notoriously so. We recognize, however, that unless we receive some uniform and comprehensive response at the Federal level, things will get much worse not only in Montana but in the country. We have exhausted our options, and we have no more time. I urge you to pass this bill.

Thank you.

The CHAIRMAN. Thank you very much. I guess you had some incidents in Helena, MT as well.

Ms. CRAIG. That is correct—an acid attack and an arson.

The CHAIRMAN. Thank you very much.

[The prepared statement of Ms. Craig follows:]

PREPARED STATEMENT OF WILLA CRAIG

Mr. Chairman and members of the committee, my name is Willa Craig and I am the executive director of Blue Mountain Clinic in Missoula, MT. Missoula is a city of approximately 70,000. I am pleased to have this opportunity today to express my support for S. 636.

Blue Mountain Clinic is a private, non-profit family health care facility founded in 1977. Our clinic, until recently, provided a wide variety of services for our community and outlying areas. We have established an internal medicine practice that serves men and women and focuses on prevention and treatment of illness. We represent all aspects of women's health care including first trimester abortion, prenatal

care and delivery, diagnosis and treatment of sexually transmitted infection, management of PMS and menopause and all available contraceptive options including vasectomy. The clinic's prenatal program is comprised of about 70% Medicaid patients, who often have difficulty obtaining OB care. Our pediatrics program provides no-cost immunizations to low income children under a contract with the State, in addition to well visits from infancy through adolescence. Low cost HIV testing and counseling is offered and is a crucial supplement since availability through our local health department is limited. The clinic's licensed counselor provides mental health therapy for a broad range of concerns. She is currently developing a practical model for therapy related to the adoption and relinquishment process aimed at both birth mothers and adoptive parents.

Patients of Blue Mountain Clinic represent all age groups from infancy through advanced age. They include disabled and elderly individuals whose mobility requires the use of wheelchairs, walkers, oxygen, or personal attendants. Montana is a vast State with a small population. This results in large areas where few medical providers can be found. For example, only 6 of Montana's 56 counties offer abortion services. A large number of our abortion and prenatal patients travel a average of 120 miles to their appointments due to lack of services in their own areas (Idaho, E. Washington, Wyoming, Canada). Our mission as a nonprofit is to make high quality health care affordable and available to Western Montana's growing population of uninsured, working poor, ad Medicare/Medicaid dependent citizens. And until recently, we were meeting that goal.

On March 29, at 4 a.m., our clinic and our ability to continue to serve the region was destroyed by a arsonist. I was asleep when I received the call from our security service, telling me that all of our alarm systems were activated. As I approached the clinic, I saw fire trucks sealing off the block. Attempts were being made to contain the blaze that had by then spread throughout the building and broken through the roof. The clinic was a total loss. I have photos that will illustrate this point. The subsequent investigation revealed that the fire had been started in two separate areas of the clinic and bore similarities to a 1992 arson fire that extensively damaged a Planned Parenthood Clinic in Helena. No arrests have made in either case.

Since the fire, we have been able to reestablish only a fraction of our previous services. Due to the lack of available medical office space in our community, our internist is able to see only about 40% of her usual patients. We are unable to accept any new patients, particularly new prenatal patients, and our pediatric care is completely on hold. The demand for abortion services in our area is not being met by the few physicians accepting our referrals.

This act of devastating violence was the culmination of several years of escalating crimes against the clinic and it's staff as providers of abortion. Although abortion comprises less than 20% of our total patient visits per month, this fact has not diminished in any way the overt hostility directed at us by antichoice protesters. Throughout the clinic's existence there have been picketers and staged protest of a peaceful nature. Neither the administration of the clinic nor local law enforcement have ever sought to limit this type of first amendment protected activity. For many years the relationship between the clinic and antiabortion protesters could be described as mutually tolerant. In the past four years, however, things have changed dramatically. The number of protesters has increased and the character of the demonstrations has consistently required police involvement. Picketers who once appeared satisfied to walk back and forth in front of our office with signs were joined by individuals who on a weekly basis blocked driveways, screamed at staff, and interfered with patients attempting to enter our facility. Because we occupied a business and medical complex, they have also impacted the clients and patients of neighboring tenants.

Beginning in November 1989, protests at the clinic became routine and a group of leaders emerged, calling themselves "Rescue Montana". This group advertised publicly it's intentions to recruit antichoice protesters who would willingly and knowingly break the law. They arrange training of new recruits in Montana by nationally known offenders and themselves travel out of state to participate in "rescues" such as the massive demonstration in Wichita.

In November 1991, "Rescue Montana" announced publicly that it would blockade a clinic that week. The mayor and county commissioners of Missoula issued a statewide press release warning that this type of conduct would not be tolerated in Missoula and would be prosecuted to the fullest extent of the law. That warning, acknowledged publicly by "Rescue Montana", was ignored. The demonstration and blockade that took place that week involved approximately 80 protesters, 31 of which were eventually arrested. Few were from our community.

During the protest the clinic was very nearly invaded by a group of large men and a staff person received minor injuries in the scuffle to prevent the invasion. Ending the blockade required the fire department, including the "Jaws of life", six units of the city police, and the county sheriffs department. The resulting trial in municipal court lasted more than 5 days and cost the city thousands of dollars. In the time period between these convictions and the arson that destroyed our clinic, may of those convicted returned, and participated in further disturbances. The clinic's written request to the court for reimbursement of property damage, staff overtime, and medical expenses was denied.

There was a point in the past when we naively believed that patience, tolerance, and cooperation with our local authorities would protect our staff, our patients, and our property. In actuality, incidents necessitating police intervention steadily increased. Even when arrests were made and convictions obtained the fines levied in local courts rarely amounted to the equivalent of a speeding ticket, even for repeat offenders.

It is no small irony that while we and other health care providers around the State work daily to protect the privacy, safety and health of other Montanans, our ability to meet those same basic human needs for ourselves and our employees has been severely compromised. Personal harassment of staff by antiabortion protesters has increased, not deceased since our clinic was destroyed. Statewide we have endured clinic blockades, acid attacks on our buildings, vandalism, hate mail and death threats. We have sought, when necessary, the protection of Montana law, with minimal result. In one Montana community local police refused to respond even to an office invasion. There is much evidence that this violent sector of the antichoice movement is systematically organized and deployed, and that it's leaders are often known to the authorities. They advertise publicly for recruits and utilize the media to announce plans and reject warnings from city officials. They have been made bolder by the lack of substantive penalties and law enforcement resources in small towns. It is evident in Montana that the scope of this violence exceeds the ability of even a willing community to respond effectively.

Montana's experience with antiabortion violence is by no means unique. Since 1977, the National Abortion Federation (NAF), of which our clinic is a member, has documented 36 bombings; 81 arsons; 327 clinic invasions; 84 cases of assault and battery; 563 clinic blockades; and 457 incidents of vandalism.

Mr. Chairman, in Montana, our history of self-reliance has served us well. We are naturally and sometimes notoriously reluctant to ask for help. We recognize however, that without a uniform, comprehensive response at the federal level, things will get worse, much worse. We have exhausted our options for self-protection in Montana. We have no more time. I urge this committee to pass S. 636.

Thank You.

NATIONAL ABORTION FEDERATION

INCIDENTS OF VIOLENCE & DISRUPTION AGAINST ABORTION PROVIDERS, 1995[1]

VIOLENCE (# Incidents)	1977-83	1984	1985	1986	1987	1988	1989	1990	1991[2]	1992	1993	TOTAL
Murder	0	0	0	0	0	0	0	0	0	0	1	1
Bombing	8	10	4	2	0	0	2	0	1	1	0	30
Arson	15	6	8	7	4	4	6	4	10	16	5	81
Attempted Bomb/Arson	5	6	10	5	0	3	2	4	1	13	0	57
Invasion	68	34	47	53	14	6	25	18	29	26	6	327
Vandalism	36	36	49	43	29	29	24	25	44	116	27	457
Assault & Battery	11	7	7	11	5	5	12	6	6	9	5	84
Death Threats	4	23	22	7	8	4	5	7	3	6	43	131
Kidnapping	2	0	0	0	0	0	0	0	0	0	0	2
Burglary	3	2	2	5	7	1	0	2	1	5	1	29
Stalking[3]	0	0	0	0	0	0	0	0	0	0	90	90
TOTAL	140	131	149	133	72	82	76	80	95	194	176	1,295
DISRUPTION												
Hate Mail & Harassing Calls	9	17	52	53	32	18	30	21	142	469	101	925
Bomb Threats	9	32	75	51	28	21	21	11	16	12	7	282
Picketing	107	160	159	141	77	151	72	45	292	2988	274	4366
TOTAL	125	209	246	245	137	191	123	77	449	3579	382	5643
CLINIC BLOCKADES												
No. Incidents	0	0	0	0	2	102	201	34	41	83	20	583
No. Arrests[4]	0	0	0	0	290	11732	12360	1363	3086	2240	745	32963

[1] As of Friday, April 16, 1993. Numbers represent incidents reported to NAF; actual numbers may be higher.
[2] The sharp increase in numbers of incidents for 1991 may be partially attributable to the computerization of NAF's tracking and recording system in mid-1991.
[3] Stalking is defined as the persistent following, threatening, and harassing of an abortion provider, staff member, or patient away from the clinic. Especially severe stalking incidents will be noted on NAF's Incidents of Extreme Violence fact sheet. Tabulation of stalking incidents began in 1993.
[4] The "number of arrests" represents the total number of arrests, not the total number of persons arrested. Many blockaders are arrested multiple times.

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NATIONAL ABORTION FEDERATION

SUMMARY OF EXTREME VIOLENCE AGAINST ABORTION PROVIDERS AS OF APRIL 15, 1993

ATTEMPTED ARSON/BOMBING	0
ARSON	3
BOMBING	0
SEVERE VANDALISM, ASSAULTS & OTHER EXTREME INCIDENTS	13
MURDER	1
TOTAL NO. OF EXTREME INCIDENTS	17

REPORTED ARSON AND BOMBING INCIDENTS

FACILITY	CITY/STATE	DATE	INCIDENT	DAMAGES
Venice Women's Health Center	Venice, FL	2/93	1 Arson	$300,000
Reproductive Services	Corpus Christi, TX	2/93	1 Arson	$1,000,000+
Blue Mountain Clinic	Missoula, MT	3/93	1 Arson	$250,000
TOTAL $ DAMAGE TO CLINICS -				$1,599,883.00

(This number reflects damage from incidents of vandalism as well as arsons and bombings.)

OTHER REPORTED INCIDENTS OF SERIOUS VIOLENCE

FACILITY	CITY/STATE	DATE	INCIDENT
Reproductive Services	San Antonio, TX	2/93	Butyric acid vandalism.
Aware Woman Center for Choice	Melbourne, FL	2/93	Ongoing stalking by Operation Rescue "Impact Teams." One staff member injured in clinic invasion.
Office of Dr. Franz Theard	El Paso, TX	2/93	Clinic invasion; several clinic staff members were assaulted and sent to hospital emergency room.
WomanCare Clinic and seven others	San Diego, CA	3/93	Butyric acid vandalism.
Pensacola Medical Services	Pensacola, FL	3/93	Dr. David Gunn murdered by protester, Michael Frederick Griffin, who said "Don't kill any more babies," as he shot Gunn three times in the back.
Dallas Medical Ladies' Pavilion	Dallas, TX	3/93	Chemical like mace or tear gas sprayed into clinic during appointments. Facility evacuated; one staff member and one patient required oxygen.

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NATIONAL ABORTION FEDERATION

YEAR-END SUMMARY OF EXTREME VIOLENCE AGAINST ABORTION PROVIDERS, 1992

ATTEMPTED ARSON/BOMBING	13
ARSON	16
BOMBING	1
SEVERE VANDALISM, ASSAULTS (see reverse)	20+
TOTAL NO. OF EXTREME INCIDENTS	51+

REPORTED ARSON AND BOMBING INCIDENTS, 1992

FACILITY	CITY/STATE	DATE	INCIDENT	ESTIMATED DAMAGE
Morgentaler Clinic Toronto	Toronto, ONT	1/92	1 Arson	$7,000
Intermountain Planned Parenthood	Helena, MT	1/92	1 Arson	$75,000
Founder's Clinic	Columbus, OH	4/92	1 Attempted Arson	$1,000
Women's Community Health Center	Beaumont, TX	1/92	1 Arson	$300,000
Catalina Medical Center	Ashland, OR	4/92	1 Arson	$225,000
Fargo Women's Health Organization	Fargo, ND	4/92	1 Arson	$2,000
Morgentaler Clinic Toronto	Toronto, ONT	5/92	1 Bombing	$600,000
Redding Feminist Women's Health Center	Redding, CA	6/92	1 Arson	$70,000
Planned Parenthood Kansas City	Kansas City, MO	6/92	1 Attempted Arson	No Damage
Family Planning Assoc.	Newport Beach, CA	7/92	1 Arson	$9,000
Lovejoy Surgicenter	Portland, OR	8/92	1 Arson	$250,000
Sacramento Feminist Women's Health Center	Sacramento, CA	8/92	1 Arson	$5,000
Richmond Medical Center for Women	Richmond, VA	9/92	1 Arson	$40,000
Abortion & Reproductive Health Svcs.	Albuquerque, NM	9/92	1 Arson	$500
Eugene Feminist Women's Health Center	Eugene, OR	9/92	1 Arson	$2,000
West End Women's Medical Group	Reno, NV	9/92	1 Arson, 2 attempts	$5,600
Concord Medical Clinic	Westmont, IL	11/92	1 Arson	$2,500
Alhambra Abortion Center	Sacramento, CA	11/92	1 Arson	$175,000
Office of Dr. Weiner	Fresno, CA	12/92	1 Arson	$50,000
TOTAL $ DAMAGE TO CLINICS - (This number reflects damage from incidents of vandalism as well as arsons and bombings.)				$2,379,093.52

OTHER REPORTED INCIDENTS OF SERIOUS VIOLENCE, 1992 (REPRESENTATIVE INCIDENTS)

FACILITY	CITY/STATE	DATE	INCIDENT
Comprehensive Health for Women	Overland Pk, KS	1/92	regular picketer assaulted 3 staff members and smashed TV
**Memphis Area Medical Center for Women, Memphis Center for Repro. Health	Memphis, TN	5/92	Butyric acid attack; costs estimated at $225,000.
Metropolitan Medical Services & Wisconsin Women's Health Care Center	Milwaukee, WI	5/92	Mailed death threats received here and at least two other clinics.
Planned Parenthood of Greater Kansas City	Kansas City, MO	5/92	Two regular protesters assaulted a neighbor of the clinic.
Women's Health Care Services	Wichita, KS	6/92	Hand grenade found in bushes outside clinic. Bomb squad determined grenade had been internally disarmed.
Wisconsin Women's Health Care Ctr.	Milwaukee, WI	8/92	Ongoing incidents including bomb threats, vandalism, and intense physician stalking.
Northland Family Planning Clinic West, Heritage Clinic, Planned Parenthood of Mid-Michigan, and 10-12 others	Detroit, Ann Arbor, & Grand Rapids, MI	9/92	A rash of incidents involving noxious chemicals sprayed into clinics. Several clinics very severely hit.

** This incident is one of the most severe of many in which noxious chemicals have been sprayed into clinics. Totals of extremely violent incidents for 1992 are tabulated on the first page of this fact sheet. See NAF's Violence and Disruption Fact Sheet for more information and totals of all incidents.

NOXIOUS CHEMICAL VANDALISM INCIDENTS AT ABORTION CLINICS
NATIONAL ABORTION FEDERATION REPORT

Date	Clinic Name	Location	$ Damage[1]	# Incidents
1992:				
1/20	*Morgentaler Clinic	Toronto, Ontario	$1,000	1
3/9	*Mayfair Women's Center	Aurora, CO	$15,000	1
3/25	*Routh Street Clinic, *Dallas Medical Ladies Pavilion, *North Park Medical Group, A to Z Women's Center	Dallas, TX	$25,000	4
4/4	*Women's Medical Center of Nebraska	Omaha, NE	$1,000	2
4/15	*Planned Parenthood Mid-Michigan	Ann Arbor, MI	$5,000	1
4/17	Women's Advisory Center	Livonia, MI	$1,000	1
4/28	*EMW Women's Surgi-Center	Louisville/Lexington, KY	$800	2
5/14	*Memphis Center for Reproductive Health, *Memphis Area Medical Ctr for Women	Memphis, TN	$200,000	2
6/3	*Family Planning Associates	Chicago, IL	$5,000	1
6/8	*Comprehensive Health for Women	Overland Park, KS	$500	1
6/18	*American Women's Medical Ctr.	Chicago, IL	$1,500	1
6/30	*Access Health Center	Downers Grove, IL	$2,000	1
7/10	*Women's Health Services	Detroit, MI	$3,000	1
7/10	*Toledo Medical Services, Ctr. for Choice II, Women's Clinic	Toledo, OH	$20,000	3
9/9	*Planned Parenthood/Houston, Aaron Women's Center	Houston, TX	$500	2
9/14	*Northland Family Planning, *Heritage Clinic, *Planned Parenthood Grand Rapids, Womancare	Detroit, Ann Arbor and Grand Rapids, MI	$40,000	4

9/16	Birth Control Ctr., WomanCare, Somerset Medical, Woman's Choice, Midwest Gynecology, Women's Center	Sterling Heights, Troy, Bloomfield Hills, MI	$60,000	6
9/16	*West End Women's Medical Group	Reno, NV	$2,000	4
9/17	*Chico Feminist Women's Health Ctr.	Chico, CA	$7,000	1
9/20	*Planned Parenthood Mid-Michigan, Health Care Clinic	Ann Arbor, MI	$7,000	2
9/22	*Heritage Clinic, Planned Parenthood, WomanCare	Grand Rapids, Lansing, MI	$13,000	3
10/13	*Hope Clinic For Women, *Bossier City Med. Suite, *Causeway Med. Suite	Shreveport, Bossier City, & Metairie, LA	$28,000	3
10/13	Women's Community Health Center	Beaumont, TX	$3,000	1
10/17	The Ladies' Ctr., Bay City Women's Medical Ctr., Dr. W. Patterson	Mobile, AL	$25,000+	3
10/20	Gentilly Women's Clinic, Dr. V. Brown	New Orleans, LA	unknown	2
10/24	Aware Woman Health Center	Port St. Lucie, FL	$3,000	1
10/25	Acadian Women's Clinic	Baton Rouge, LA	unknown	1
11/10	*West Loop Clinic	Houston, TX	$750	1
12/16	Aware Woman Health Center	Melbourne, FL	$5,000	1
1993:				
02/07	Reproductive Services	San Antonio, TX	$10,000	1
03/08	*Wichita Family Planning, Planned Parenthood	Wichita, KS	$5,000	2
03/09	*WomanCare, Planned Parenthood of Riverside, 8 other facilities	San Diego, CA Los Angeles, CA	$50,000+	10
05/09	Women's Pavilion	South Bend, IN	Incomplete	1
TOTALS:			$545,050	71

* immediately preceding a clinic's name indicates that the clinic is a member of the National Abortion Federation.

[1] In calculating dollar damages, NAF has erred on the side of the lower estimate when exact figures are not available. Most damage totals were provided directly to NAF by the clinics affected; when this information was unavailable, damages were estimated using police accounts, newspaper reports, and information from nearby clinics.

THE COST OF CLINIC BLOCKADES
NATIONAL ABORTION FEDERATION FACT SHEET

City	Dates	Cost[1]	# Arrested	Comments
ATLANTA, GA	7/88, 10/88	$500,000	1,235	Operation Rescue's (OR) first major national action, during the Democratic convention. The burden on local police was particularly overwhelming when added to the security needs of the convention.
WICHITA, KS	7/91 - 8/91	$1,000,000	2,741	OR announced plans for a one-week blockade, but instead stayed six. Judge Patrick Kelly called in federal marshals to enforce his order barring OR from blockading clinics.
MANASSAS, VA	11/91	$5,000	68	One-day blockade in small suburb of Washington, DC. Chief Sam Ellis of the Manassas police department testified before Congress that he feared city police would be overwhelmed if blockades continued.
BUFFALO, NY	4/92	$385,250	605	Buffalo Mayor James Griffin invited OR to target the city. City Judge Broderick, endorsed by the Right-to-Life party, acquitted 33 of 34 blockaders brought before him.
MILWAUKEE, WI	6/92 - ongoing	$1,500,000+	2,117	421 juveniles have been arrested in this ongoing assault on Milwaukee clinics.
BATON ROUGE, LA	7/92	*	30+	*COST DATA STILL BEING COMPILED.
HOUSTON, TX	8/92	*		*COST DATA STILL BEING COMPILED.
TOTALS:		$2,386,250	6,696	

[1] Costs indicate only the cost to the city, county and/or other jurisdictions providing law enforcement and other official responses to clinic blockades; this includes such items as police overtime, city and county costs for prosecutions, correctional housing costs, police training, and other related expenses. Costs to individual clinics and other organizations involved in providing pro-choice response, and other similar costs are not included in the estimate.

3/93

The CHAIRMAN. Mr. Lasso, we would be glad to hear from you. If you can do it within 5-minutes, we'd be very grateful.

Mr. LASSO. Yes. Thank you very much for the opportunity to address the committee today.

For 10 years prior to being appointed city manager just recently, I was the city attorney, and it was my job to enforce the laws of the Commonwealth of Virginia and the city of Falls Church, to protect the public inasmuch as they wanted to use a local women's clinic called Commonwealth Women's Clinic in the city of Falls Church for reproductive services, and to protect the operators of that clinic from pursuing a lawful activity.

There have been hundreds of cases called "rescues" in the city of Falls Church in the last several years. These unlawful activities made women and men hostages in the health facilities and in their cars in the parking lot. Some of these people were not present for abortions. In one instance, a woman was trapped in the parking lot, unable to move anywhere; she was there for a pap smear.

While held in their cars or in the facility, they were taunted and vilified, and the police officers themselves were hurt as they attempted to remove the blockaders of even second floor fire escapes. These people refused to leave and had to be carried off, often as limp weights of at least a couple hundred pounds. Oftentimes, they would throw their elbows back, and at least on one occasion, they fractured the eye socket of a police officer who was attempting to remove the person.

The city is only 2 square miles; it is quite small. We have only 27 police officers now. I have with me Lieutenant Greg King of the police department to answer any questions you might have about what actually occurs.

I'd like to show you a photograph of one of these blockades. This is a photograph of the rear of the Commonwealth Women's Medical Clinic in Falls Church. This is the parking lot area. This is the second floor fire escape, and you can see that the fire escape is completely clogged with people who had to be carried away. Similarly, they completely blocked the rear exit, and they completely blocked all other exits. One of the great fears we have always had is what would happen if a fire occurred, and how would we get people out. I daresay it would be next to impossible with a blockade being done in this manner.

The ability of Falls Church to prevent these blockades is extremely limited. We cannot seek injunctions, except prior to Bray, through the Federal court, that would have any effect outside of the State of Virginia. We cannot, even if we know of a plan being hatched outside the State, seek help in doing anything about it, except to go to the Federal courts.

We cannot enforce any laws in Virginia currently except misdemeanors. So even if someone comes, is convicted, and leaves the State, they cannot then be extradited back to Virginia if they choose to leave after being convicted and then to serve out their punishment.

The Federal law would go a great distance in helping us. We know that it works. These blockades continued on three separate occasions—once in October of 1988, then December of 1988, later in August of 1989. But when the court in the Eastern District of

Virginia entered the Federal injunction against Operation Rescue and those who would participate with them, the blockades stopped, and there hasn't been one since. We believe that Federal action is necessary, and we know that it works. We know that the Federal Government has the authority and the power to share information with us that, as the Attorney General noted, we don't have access to or, if we do, it is extremely fragmented.

We appreciate the efforts of the committee, and we are very much in support of the legislation. We did submit an amicus brief in the Bray case.

I thank you very much for the opportunity to address you.

[The prepared statement of Mr. Lasso follows:]

PREPARED STATEMENT OF DAVID R. LASSO

Mr. Chairman, Senators, my name is David Lasso, I am the city manager for Falls Church, VA. Prior to March 1993, I was the city attorney and as such, I was the official sworn and duty bound to prosecute all misdemeanors occurring in the city. I speak to you in that capacity and not on behalf of any group or organization, I have with me today it. Gregory King of the Falls Church police department.

In my 10 years in office, hundreds of cases involving military-style assaults on medical facilities have been brought in Falls Church. Called "rescues"—these unlawful activities made women and men hostages in the health facility and in cars on parking lots. While captive and in fear, they were taunted and vilified, police were hurt as blockaders of even second-floor fire escapes refused to leave and had to be carried—mostly as limp 150—200 lb. weights, but some throwing elbows, fracturing the eye socket of one officer.

S. 636, "The Freedom of Access to Clinic Entrances Act of 1993," and my testimony are not about picketing or the peaceful protests. They are about the illegal, forceful blockading of certain medical facilities.

One series of blockades in Falls Church in 1988 was among those giving rise to the case ultimately decided by the U.S. Supreme Court this year in Bray v. Alexandria Women's Health Clinic, 506 U.S.———(1993). Among the plaintiffs in that case was a clinic located in Falls Church, the Commonwealth Women's Clinic, which provides a full range of gynecological and obstetric services for women as well as certain reproductive services for men. It is commonly known that the clinic will provide first trimester abortions.

I'd like to tell you a little about what occurred at this clinic—all of which is well documented in the record of the Bray case—and how our experience demonstrates that this problem cannot be left to State or local authorities. It is a classic situation calling for Federal help.

For years, there have been weekly peaceful pickets of the clinic by persons opposed to abortion; there has also been picketing by persons in support of a woman's right to choose a first trimester abortion. The city takes no position on these respective views. Rather, it simply takes the position that it is the obligation of the city to protect the established rights of the protestors to express their view and to protect the patients of the clinic when they are unlawfully impeded or even prohibited from exercising their Federal and State rights to reproductive services. Included as well is the obligation to protect the right of the clinic to operate a lawful medical business.

On many occasions persons opposed to the activity of the clinic trespassed for the purpose of giving antiabortion literature to patients considering an abortion. In addition, on some occasions these activities escalated to situations where persons opposed to abortions sought to close the clinic by literally imposing a human blockade. These blockades are often commonly referred to as "rescues" and they are preplanned in relative secret. On the selected day, hundreds of persons arrive at the selected clinic (only the organizers know the exact location until the buses of "rescuers" arrive). These persons follow the instructions of the organizers and, typically, they place themselves at every means of access to the clinic, sit down and lock arms. The police provide warnings and then, working in teams, they arrest, photograph, and carry away the trespassers. There are often so many trespassers that school buses are used in shifts to transport the trespassers to the city's council chamber, which is converted to a holding area and magistrate's office for the purpose of booking and setting of bail.

As persons are arrested, others run or crawl from the public sidewalk to take their place. The organizers stay on the public sidewalk in the crowd until the police are able to identify them and make an arrest for instigating others to trespass.

The city of Falls Church is rightfully proud of its nationally accredited police department. However, it is a very small one—in 1988 we had only 30 sworn officers; today, as a result of reductions in staff, there are only twenty-seven. The city has well-defined contingency plans for these blockades, but it cannot combat effectively the military-style tactics of these blockades. in one blockade, there were 240 blockaders. It has always been necessary to rely on mutual aid agreements and to ask for assistance from Arlington, Fairfax, and the State police.

But even with warning, getting these forces to the scene and organizing them in a way that the response can be well-measured and not counterproductive takes hours. once organized, it further takes hours to remove the trespassers. In short, and despite the city's best efforts, for a substantial period the blockade effectively closes the clinic and women are denied their State and Federal rights.

And the problem does not end with the arrest. For example, over 200 arrests were made after the October 29, 1988, blockade. The city prosecutes all misdemeanors through the city attorney and his part-time assistant. There were so many defendants that the trials had to be consolidated and held at one time. The only available site large enough was the community center gymnasium, which lacked a certain decorum.

It must be noted here that the defendants can only be charged with misdemeanors. These include trespass (Va. Code §18.2–119), instigating others to trespass (§18.2–120), blocking free passage (§18.2–404), and unlawful assembly (§18.2–406). As the potential charges are misdemeanors, the city has no practical ability to charge or seek injunctions against persons in other States who may have planned the disturbance; even if the States involved were willing to extradite, the process would consume months. The injunctive powers of Virginia courts end at Virginia boundaries. Activities like operation rescue are usually multi-State activities and the ability of localities like Falls Church to prevent them is all but nonexistent.

It was not until the Federal district court in the Bray litigation issued an injunction against operation rescue that the blockades of the clinic in Falls Church stopped. Federal intervention made all the difference in ending the massive blockades.

When that injunction was challenged on appeal, the city council authorized the submission of an amicus curiae brief in the Bray case before the Supreme Court. A copy is attached as part of my statement.

But, as you know, the Supreme Court ruled in January that the Federal law on which the injunction was mainly based is inapplicable to antiabortion conduct. As a result of that decision, Federal help no longer is available to stop this military-style assault. In Virginia, other than misdemeanor penalties, localities like ours now have no effective means to prevent the blockades that are planned out of Virginia and are beyond the reach of Virginia law.

For that reason, it is urgent that new Federal legislation be passed. It is critical to enable us to prevent and to punish the kind of blockades that have plagued our city.

Thank you.

No. 90-985

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JANE BRAY, OPERATION RESCUE, *et al.*
Petitioners,

v.

ALEXANDRIA WOMEN'S HEALTH CLINIC,
NATIONAL ORGANIZATION FOR WOMEN, *et al.*,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Fourth Circuit

BRIEF FOR FALLS CHURCH, VIRGINIA AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS

Falls Church, Virginia was the site of Operation Rescue blockades enjoined in this case, and the city participates as *amicus curiae* to urge the Court to affirm the injunction. Operation Rescue repeatedly summoned hundreds of people to Falls Church to mass around Commonwealth Women's Clinic and seal it off, barring women's access to the clinic for abortions or other medical care. Faced with concerted efforts to incapacitate them, the 30-member Falls Church police force cannot secure access to the clinic premises and adjacent public streets. After the entry of the injunction under 42 U.S.C. § 1985(3), however, the illegal blockades stopped. The federal injunction has been critical to effective law enforcement in Falls Church. Operation Rescue is a nationwide effort, and purely local solutions are unrealistic and inappropriate. Injunctions under state law must be litigated on a case-by-case basis, and pertain only to a particular property. Once one clinic is protected, others in the state bear the brunt of the blockades. Moreover, jurisdiction to prosecute persons in contempt of state court injunctions is only state-wide, and many of the blockaders are from out of state.

No. 90-985

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BRIEF FOR FALLS CHURCH, VIRGINIA AMICUS CURIAE IN SUPPORT OF RESPONDENTS

SUMMARY OF ARGUMENT

The City of Falls Church urges this Court to affirm the injunction under 42 U.S.C. §1985(3) to prevent blockades that hinder local police in their ability to protect statutory and constitutional rights of citizens. Despite its best efforts, the police department of Falls Church was prevented by the overwhelming number of

people involved in Operation Rescue from securing state and federal rights for women seeking entrance to the Commonwealth Women's Clinic. The clinic was therefore closed for several hours. Since Operation Rescue tactics are used nationwide, the City believes that it is essential that §1985(3) be used to assist police in ensuring that constitutional and statutory rights are protected fully for women who choose to exercise their constitutional right to abortion.

ARGUMENT

On October 29, 1988, local, county, and state police were temporarily unable to secure the protections of state law to people who sought to use the Commonwealth Women's Clinic in Falls Church City because the Operation Rescue blockade frustrated the efforts of Falls Church police to clear access to the clinic. A similar threat to the effectiveness of state law enforcement would be posed by conspiratorial blockades that purposefully prevented African-American children from attending integrated schools, kept members of a religious

congregation from entering their temple, mosque, or church, or that excluded Hispanic voters from the polls. Suck blockades violate § 1985(3) when carried out by a conspiracy seeking to nullify the constitutional rights of a class by overwhelming the state's ability to enforce its laws to protect the class as it exercises its rights. The role of state law in securing personal liberty and organizing peaceful interaction among individuals cannot be fulfilled when nationwide conspiracies are permitted to deprive state-law protection to certain groups.

The City of Falls Church, Virginia, is an independent city of the second class encompassing but 2.2 square miles with about 9,600 residents. Located on State Route 7 (West Broad Street) in the City is the Commonwealth Women's Clinic; it provides a full range of gynecological and obstetric services for women and it also provides counseling and certain reproductive services for men. The clinic holds itself out as a "pro-choice" clinic and it is commonly known that the clinic will provide first trimester abortions.

Over the past many years, there have been weekly

peaceful picketing of the clinic by persons opposed to abortion; there has also been picketing by persons in support of a woman's right to choose a first trimester abortion. The City takes no position on these respective views. Rather, it simply takes the position that it is the obligation of the City to protect the established rights of the protestors to express their view and to protect the patients of the clinic when they are unlawfully impeded or even prohibited from exercising their federal and state rights to reproductive services. Included as well is the obligation to protect the right of the clinic to operate a lawful medical business.

On many occasions persons opposed to the activity of the clinic have trespassed for the purpose of giving anti-abortion literature to patients considering an abortion. See *Buckley v. City of Falls Church*, 7 Va. App. 32, 371 S.E.2d 827 (1988)(defense of necessity not applicable because reasonable alternative means was available to achieve defendants' purpose of communicating with patients "concerning the impact of an abortion on both the fetus and the patient").

More recently, these activities have escalated to situations where persons opposed to abortions have sought to close the clinic by literally imposing a human blockade. These blockades are often commonly referred to as "rescues" and they are preplanned in relative secret. On the selected day, hundreds of persons arrive at the selected clinic (only the organizers know the exact location until the buses of "rescuers" arrive). These persons follow the instructions of the organizers and, typically, they place themselves at every means of access to the clinic, sit down and lock arms. The police provide warnings and then, working in teams, they arrest, photograph, and carry away the trespassers. There are often so many trespassers that school buses are used in shifts to transport the trespassers to the City's Council Chamber, which is converted to a holding area and magistrate's office for the purpose of booking and setting of bail.

As persons are arrested, others run or crawl from the public sidewalk to take their place. The organizers stay on the public sidewalk in the crowd until the police are

able to identify them and make an arrest for instigating others to trespass. Virginia Code Ann. § 18.2-120 (1988 Repl. Vol.).

The City is rightfully proud of its nationally accredited police department; however, it is admitted that it is a small one with only thirty sworn officers. The City has well-defined contingency plans for these blockades, but it cannot combat effectively the military-style tactics of these blockades. It has always been necessary to rely on mutual aid agreements and to ask for assistance from Arlington, Fairfax, and the State police.

But even with warning, getting these forces to the scene and organizing them in a way that the response can be well-measured and not counterproductive takes hours. Once organized, it further takes hours to remove the trespassers. In short, and despite the City's best efforts, for a substantial period the blockade effectively closes the clinic and women are denied their state and federal rights.

But the hindering of the state criminal justice system does not end with the arrest. For example, over 200 arrests were made after the October 29, 1988 blockade. The City prosecutes all misdemeanors through the City Attorney and his part-time assistant. There were so many defendants that the trials had to be consolidated and held at one time. The only available site large enough was the community center gymnasium, which lacked a certain decorum.

It must be noted here that the defendants are charged with misdemeanors. These include trespass (Va. Code § 18.2-119), instigating others to trespass (§ 18.2-120), blocking free passage (§ 18.2-404), and unlawful assembly (§ 18.2-406). As the potential charges are misdemeanors, the City has no practical ability to charge or seek injunctions that they can enforce against persons in other states who may have planned the disturbance; even if the states involved were willing to extradite, the process would consume months. The injunctive powers of Virginia courts end at Virginia boundaries. Activities like Operation Rescue are usually multistate activities and the ability of localities like Falls Church to prevent them is all but non-existent.

Even though many persons participating [illegible] were prosecuted after each disturbance, the blockades did not stop. Another occurred on December 6, 1988, and again on August 19, 1989. The City believes that the federal injunction at issue here and its ability to be enforced nationwide using the authority of the federal court was critical in preventing additional blockades.

The City's interest, indeed its duty, to protect the rights of citizens secured by federal, state and local laws was greatly enhanced by the injunction. It is the City's position that it was appropriate and fully consistent with federal law.

As said earlier, the City of Falls Church takes no position on the views of either party regarding abortion. If Falls Church were voluntarily to withhold police protection from women seeking to visit the clinics out of a desire to prevent women from having abortions, the City would have violated the women's constitutional and state-protected rights to gynecological services, including abortion. Where it is a mob, rather than a City, that seeks to deprive its targets of constitutional rights by exercising those rights, the mob action violates §1985(3). In this case, the Falls Church police did all that they were able to do to secure the protection of state law to plaintiffs in this action as they sought to enter Commonwealth Women's Clinic to receive or render services there. Against the forces of Operation Rescue, however, the City's efforts proved inadequate. The police force (even as supplemented at considerable cost by county and state law enforcement officers) was unable to ensure access to the clinic for many hours, during which several patients were unable to have scheduled abortions or receive even the simplest of gynecological services. Some suffered physical injury, locked captive in cars that could not move through the parking lot, or bunkered inside the clinic from which medical personnel seeking to treat them had been denied access.

There is also the incalculable injury to a woman's sense of well-being when she is forced to see that local law enforcement officials were, even temporarily, unable to protect her rights. It is the duty, and it was the intent

of Congress in 1871, to bring the power of the federal government to bear upon such reprehensible efforts at intimidation, be it against African-Americans seeking the same rights as other citizens or women seeking access to lawful reproductive services. In this particular context, there can be no doubt and no evidence need be offered to prove that the decision of a woman to terminate her pregnancy is painful and very difficult as it takes into account the most personal and deeply felt considerations. It would be unfortunate, at best, if the powers of the federal government were unavailable to prevent those persons who would conspire to take undue advantage of women in these circumstances.

It was only when the federal court in this case entered its injunction under §1985(3) against the blockades and those that would act in furtherance of them that these disturbances ceased. Peaceful Operation Rescue demonstrations protected by the First Amendment continue outside the clinic, but with the support of the federal court injunction, those women who choose to do so are also able to seek services at the

picketed clinics.

The City police were, of course, "unable to prevent the closing of the clinic for more than six hours." *National Organization for Women v. Operation Rescue*, 726 F.Supp. 1483, 1489, n.4. (S.D.N.Y. 1989). Police Lieutenant Gregory King of Falls Church, Virginia, testified that an Operation Rescue leader "told me that the rescue mission would cease if I could guarantee that there would be no more abortions at the clinic that day. And of course I couldn't guarantee those kind of things."[1] He described in detail the hindrance the local and state police departments experience at the hands of Operation Rescue:

> ... We have 30 sworn members. So, what that entails is getting together with four other agencies. I use the Arlington County Sheriff's department, the Arlington County Police Department, the Virginia State Police, and sometimes Virginia Department of Corrections to coordinate the arrest procedures on the scene.

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[1]Lieutenant Gregory King testified at the trial. A transcript of his testimony appears in the record on appeal in the United States Court of Appeals for the Fourth Circuit. Reference to his testimony in the form "App. __" refer to the page in the Court of Appeals Appendix on which the quoted passage appears.

> At times we have over 100 people to arrest, it would require about all those agencies joined together to make it work.
>
> ... [In December 1988] we knew that our clinic was gong to be hit and were able to plan and we were there long before it even got started. But it [the clinic] still went down, yes.

R.213-214. Notwithstanding some successful arrests and prosecutions, the blockades continued to occur. R.107.

The City has chosen to uses its available resources to try to keep the clinic open. It would be easier, but wrong, to request the clinic to close. It is easier, but wrong, to ask a controversial organization not to march and express their views when it is apparent that there will be vocal, possibly violent, objections from bystanders.

The City agrees with the legal arguments made by the plaintiffs and the *amici*. It is the purpose of this brief to apprise the court of the very practical considerations involved in this case as City officials have lived through them.

CONCLUSION

For the reasons stated in the foregoing brief of *Amicus Curiae* the City of Falls Church, the decision of the United States Court of Appeals for the Fourth Circuit Court should be affirmed, thereby sustaining the injunction that has permitted the equal enforcement of state law to all persons in Falls Church without regard to whether they seek to exercise unpopular rights.

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The CHAIRMAN. Thank you very much.

I'll ask the staff to follow 6-minute rounds.

As I understand, Mr. Lasso, the October 29, 1988 instance, or so-called "rescue" actually closed the clinic from 7 a.m. to 1:30 p.m., despite the best efforts of the police department to keep it accessible. Is that right?

Mr. LASSO. That's absolutely correct.

The CHAIRMAN. How did the blockade do this?

Mr. LASSO. The blockaders meet in some place other than Falls Church, and they assemble into buses. At that point, they are told where they are going. They arrive in buses, and they unload as groups and either walks, sometimes run, and literally overwhelm whatever force we might have present to stop them. Oftentimes, we don't know that they are coming, so it is very easy for them to immediately surround and literally engulf the clinic with human bodies.

The CHAIRMAN. And you have indicated that the availability of law enforcement in your community, as I imagine other small communities, is such that it is virtually impossible to deal with this kind of coordinated action that is taking place.

Mr. LASSO. That's correct, Senator. We have to rely on mutual aid agreements with other jurisdictions, and it takes time to call that into effect. At the time these blockades occurred, we had 30 officers, and we only have 27 now.

The CHAIRMAN. And it would still be a problem for you today?

Mr. LASSO. Yes, sir, very much so.

The CHAIRMAN. Let me ask Dr. Rodriguez and Ms. Craig, why do you continue to perform abortions in light of all this?

Dr. RODRIGUEZ. Well, it is my personal conviction as a physician—sometimes, I am overcome by fear that something might happen to me—but I do believe in the constitutional right of my patients, and I find myself as an instrument of the Constitution, and as long as abortion is legal in this country and as long as I have a license to practice obstetrics and gynecology, I will continue to perform my duty as I was trained to do.

The CHAIRMAN. Is part of this fear that if you close down, other clinics will close down, and we will go back to a situation where there are back alley abortions, which poses serious threats of risk to the life and physical well-being and the health of people? Is that part of it?

Dr. RODRIGUEZ. That is absolutely true. The number of physicians is dwindling, and those of us who still remain feel a special responsibility to continue to practice for as long as we can.

I am only 37 years old. I have never dealt with an illegal abortion in my career. So if this would happen, they would come to me as a matter of fact to come and deal with these problems, and I don't find myself qualified to deal with something that I really have no trained for.

The CHAIRMAN. Ms. Craig, do you object to picketers or leafleteers outside of your clinic?

Ms. CRAIG. Not at all. As a matter of fact, as I stated in my testimony, we have a long history of that. The relationship until about 4 years ago had been one of tolerance. I support their right to that

activity, and as long as they are not interfering with our patients, they are welcome to do that in front of our clinic.

The CHAIRMAN. Finally, what effect do the blockades have on your patients in terms of the medical implications?

Ms. CRAIG. I think Dr. Rodriguez may actually be able to address that better than I can.

The CHAIRMAN. OK. Could you tell us, Doctor?

Dr. RODRIGUEZ. Well, like I mentioned previously, it does increase the risk of complications for patients.

The CHAIRMAN. Is this because it makes them nervous or increases their anxiety, and this has health implications?

Dr. RODRIGUEZ. Correct. First-trimester abortions are mostly done under local anesthesia, which requires 100 percent cooperation on the part of the patient and also 100 percent performance from the physician. And when your clinic is under seige, when you have just walked over hundreds of bodies, when your life has been threatened, it is very difficult to achieve that 100 percent cooperation on both sides, and the risk therefore increases.

We have quantified that increase in risk already in our clinic, with more complications being noticed in the first 3 months of this year.

The CHAIRMAN. Senator Gregg.

Senator GREGG. Thank you, Mr. Chairman.

I think it is an excellent panel, and I wish we had another panel to talk about the same type of violence that has occurred against other parties involved in protest and action. There is no right that anybody in this country has to commit acts of violence or to threaten lives; we all recognize that, and I certainly empathize deeply with the doctor, having gone through some of those issues myself as a political leader.

The issue here really isn't the specifics of what you talk about, because the specifics of what you talk about is wrong—I mean, the acts that were taken relative to you folks were wrong. The issues here are two. The first is should this be a national law, or can the States retain the right to protect your rights. And second, if we accept that there should be a national law, is this law as proposed so over-reaching in an attempt to address the issues that have impacted you, and treated you inappropriately, has it so over-reached itself that it is going to have the unintended consequence of limiting the rights of other citizens who are acting fairly.

I guess I would address to you, Doctor—I take it you just were not comfortable with the response of the Providence police department to your situation, and you think they did a pretty darned poor job of protecting you.

Dr. RODRIGUEZ. Absolutely. In one of the invasions, they did not even arrest anybody, and these people were blocking access to my facility. So——

Senator GREGG. Now, do you think that was a conscious decision by the Providence police department to sort of step out of this issue because it was political, or was it simply because they felt they could not find someone to arrest, or simply as a matter of police work were not able to resolve the issue?

Dr. RODRIGUEZ. They felt overwhelmed. The sergeant in charge did not want to commit all the forces of the town. It would have required every policeman on duty for the entire city.

Senator GREGG. Is this Providence?

Dr. RODRIGUEZ. This is in Providence. And they just decided to step back and wait for these people to move out of the way, which is completely wrong, because these people were blocking access to our clinic, and they violated the law, and they should have been arrested—and we demanded that they be arrested, and nothing happened.

Senator GREGG. So you think it was because they did not have the capacity to do it versus the desire to do it?

Dr. RODRIGUEZ. They didn't have the will to do it.

Senator GREGG. They didn't have the will to do it; so it was sort of a political decision on their part, in your opinion?

Dr. RODRIGUEZ. Absolutely.

Senator GREGG. Second, is there somebody investigating this fire? Is there a Federal agency involved in the investigation of this fire?

Ms. CRAIG. Yes. The ATF did conduct an investigation, since it was obviously an arson.

Senator GREGG. And did they give you a conclusion as to what was the cause?

Ms. CRAIG. Arson with the use of an incendiary device that was spread throughout the clinic and then lit from the parking lot.

Senator GREGG. Did they identify a perpetrator?

Ms. CRAIG. They have suspects that they are interviewing. I am not aware of anything further with regard to that.

Senator GREGG. Are those perpetrators pro-life activities, or anti-abortion activists, or are they disgruntled employees, or are they just arsonists?

Ms. CRAIG. In my limited knowledge of the investigation, the indication is that they are investigating right to life activists who have formerly prosecuted by the clinic.

Senator GREGG. Now, this is a Federal investigation that has been going forward and has identified these folks—or is in the process of identifying these folks.

Ms. CRAIG. Yes. They are working in conjunction with our local police.

Senator GREGG. Doctor, let me ask you—Senator Mikulski made the point about the nun—I don't know if you were here—standing out in front of the center, doing a rosary. If the nun or her companion, or a priest, were holding a sign, and a Catholic person who had decided to have an abortion, who had been brought up in the Catholic church, was coming into the clinic, and the priest was holding a sign saying you are violating the laws of your religion, and that person was handed a leaflet as they came in by the nun, and maybe this person had gone to a Catholic school for all of her education, would you presume that that might have some emotional effect on the person's attitude as she went into that clinic?

Dr. RODRIGUEZ. I wouldn't presume on everybody, but on some people there might be a nervous reaction to that kind of activity. That kind of activity, however, has been going on in our clinic since we opened, and we never sought to limit it or to stop it. We are

seeking to stop people from blocking our doors, from threatening my family and from threatening myself.

Senator GREGG. As they should be. But unfortunately, this law, as drafted, I think a prosecutor with some enthusiasm could certainly have applied this to that woman going into your clinic on the testimony of what you just said, and this law would apply to her.

Thank you.

The CHAIRMAN. We'll have a professor of law who will be glad to deal with that issue——

Senator GREGG. Yes, but we have a doctor here who would be my expert witness.

The CHAIRMAN. Yes, that's fine, but we appreciate what you testify to, and that is enormously powerful.

Senator Pell.

Senator PELL. Thank you, Mr. Chairman.

I am particularly glad to see Dr. Rodriguez, who has an excellent reputation in my own home State and is a constituent there, and regret exceedingly the conditions that have caused you to come here. I share your distaste and horror for the use of threat and violence for political objectives.

I am not sure, Mr. Chairman—did we put in the record the "Wanted" poster?

The CHAIRMAN. Yes.

Senator PELL. That is in the record. Good.

[Document follows:]

WANTED

FOR CRIMES AGAINST HUMANITY

PABLO "THE BUTCHER"
RODRIGUEZ

THIS MAN IS PERSONALLY RESPONSIBLE FOR THE GRUESOME SLAUGHTER OF SEVERAL THOUSAND CHILDREN IN THE GREATER RHODE ISLAND AREA!

ONCE A PRACTICING PHYSICIAN, RODRIGUEZ ABANDONED THE MEDICAL PROFESSION FOR A MORE LUCRATIVE "PROFESSION" AS A HIRED KILLER. SINCE THEN HE HAS RUTHLESSLY SLAUGHTERED THOUSANDS OF CHILDREN, FREQUENTLY LEAVING THEIR MOTHERS SEVERELY MAIMED, AND THEIR FAMILIES IN RUINS.

IF YOU SEE THIS MAN, CALL 401-421-9620
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Senator PELL. In your testimony, Dr. Rodriguez, you mentioned that the abuse or the threats had widened to include Planned Parenthood. Could you enlarge on that a little bit?

Dr. RODRIGUEZ. Yes. I only mentioned brief examples on my person and some attacks on the clinic, but in the last few weeks, there has been stalking of our executive director; our clinic has been continuously vandalized with red paint on the windows and on the walls; volunteers have been assaulted in their cars; board members have been attacked in the legislature when they were attending hearings. It has been a continuous escalation of these activities, which we really did not have years ago. It has been since the election of a pro-choice President that these activities have increased dramatically in Rhode Island.

The staff is in a complete State of panic. You see these poor women just looking over their shoulders as they come out of the doors of the clinic, because of these threatening people who threaten our security.

Senator PELL. And how many clinics do you have?

Dr. RODRIGUEZ. There is just one clinic, one State-wide clinic in Providence, RI.

Senator PELL. And have you sought police security, or have you received any security there?

Dr. RODRIGUEZ. We have to pay for police to be in front of our clinic. We pay a police detail. We had one during the last invasion, and he was completely overwhelmed by the entire group. They almost trampled him.

Senator PELL. Is it the same clinic that you work as Planned Parenthood, or is that two separate clinics?

Dr. RODRIGUEZ. It's the same clinic.

Senator PELL. So in other words, the director of Planned Parenthood, for example, would be subject to the same abuse and threats that you are?

Dr. RODRIGUEZ. Absolutely.

Senator PELL. I regret to hear this, because traditionally, as you know, our State, being one with the independent man at the top of the State House, we have always advocated the maximum freedom of expression and thought. We thank you very much for coming down here and for the courage all three of you have shown in your work and wish you well.

Thank you very much.

Dr. RODRIGUEZ. Thank you.

The CHAIRMAN. I want to express our appreciation, too. You have told us what is happening in an urban area, what is happening in a rural community, and what is happening in a smaller community that have tried to utilize their resources. Obviously, it is a matter of national importance. This phenomenon has grown and is well-organized and structured and is threatening people and lives and families in a way that is completely unacceptable here.

So we appreciate your presence here and your testimony and we thank you very much.

Our next witness today is Professor Larry Tribe, who is the Tyler Professor of Constitutional Law at Harvard Law School. He has appeared on a number of different constitutional issues in the Judiciary Committee and before our committee here, and he has been one

of the most thoughtful commentators on constitutional law and a prolific writer on the Constitution and has been an enormous asset for this institution, certainly for me personally, and I think I speak for many other members of the Senate who are trying to better understand the protections of individual rights and liberties and the real core meaning of the Constitution. So we are enormously appreciative for his presence here today and for his testimony on this issue.

It is nice to see you again.

STATEMENT OF LAURENCE H. TRIBE, TYLER PROFESSOR OF CONSTITUTIONAL LAW, HARVARD LAW SCHOOL, CAMBRIDGE, MA

Mr. TRIBE. It is nice to see you, Mr. Chairman, and I want to thank the committee for inviting me to testify.

I am honored to provide whatever help I can on a matter that is so vital, and I am especially honored to be following the Attorney General of the United States, Janet Reno, whom I have come to admire enormously, and to be testifying along with such brave people as Dr. Rodriguez, Ms. Craig and Mr. Lasso.

My prepared statement, which I would like to submit for the record, explains in some detail the affirmative basis, primarily under the Commerce Clause, for Congress' authority to enact this legislation, but in my oral remarks I want to focus on the first amendment challenges that some have launched against this Freedom of Access to Clinic Entrances Act and to explain why I believe that those challenges are completely without merit and should be set to rest.

Now, of course, nobody seriously argues that the first amendment protects murder, arson, trespass, physical assault, or physical intimidation as such, the kinds of actions that are specifically prohibited by S. 636. The first amendment arguments focus primarily, and ironically, not on the breadth of this law—although I understand that Senator Gregg and Senator Coats have raised questions about that, and I would be happy to address those—but they focus on its narrowness; how carefully limited it is to violent actions which deliberately interfere with access to abortion rather than simultaneously tackling problems of violence in other contexts.

Now, one might ask, What is objectionable about limiting the bill in this way. I mean, after all, these are the particular kinds of violent episodes that Congress is grappling with today. As the Attorney General indicated, she appears interested in working with any Senator who thinks there are other problems of violence. I want to say that I would be happy to be of help in dealing with other problems of violence, but that is not what this committee is looking at at the moment.

One argument that some people make to object to this law's narrowness, I want to highlight and explain why I find completely offbase. That is the argument that because this law focuses on the motive or on the intent of the person who assaults a woman or a doctor, or who invades a clinic's property, that this law really violates the freedom of thought.

For example, the National Right to Life Committee in its release of February 26 of this year said, and I quote, "No conviction is pos-

sible unless the prohibited motivation is demonstrated. So in a very real sense, such legislation seeks to create a Federal thought crime." That's the end of the quote. And I have heard increasing amounts of commentary to that effect.

I don't know of any very mild way to say this—I think it is just completely absurd. Most laws prohibiting wrong-doing make civil or criminal liability depend on the wrongdoer's specific State of mind. Why is that? Well, it is not because Congress or the legislatures have decided to begin punishing people for their thoughts. It is because even a dog knows the difference between being tripped over and being kicked. It is widely regarded as a mark of our civilization that we make the intention of the actor relevant to the question of whether the person is deemed a wrongdoer. And it is very late in the day in this century to be saying that we should repeal 300 or 400 years in which we have narrowed our laws down to focus on why it is that someone committed a particular wrong.

Just to take one example familiar to everybody, the recent Federal civil rights conviction of Los Angeles police officers Koon and Powell was a conviction for using force against Rodney King, with the specific intent to deprive him of particular Federal rights. And no one suggested that looking into the State of mind of the defendant in that case made it a first amendment violation.

The laws criminalizing treason have exactly the same structure; unless it is proven that you gave information to someone with the intent to help the enemy, you are not guilty.

And, as the Attorney General pointed out, 18 U.S. Code, Section 245 makes it a Federal crime to use force or threats of force or, I might add, attempts as well, with the intent of preventing someone from engaging in certain specific lawful activities—voting, applying for Federal employment or Federal benefits, serving as a juror in any Federal trial. Now, it is true that that law, for example, does not extend to uses of force to prevent such other lawful activities as gathering petition signatures or attending religious services. But no one has ever suggested in the long period that that law was on the books, that because it did not simultaneously attack every arguably analogous problem that it was constitutionally suspect.

In fact, no court in the history of this country has ever suggested that the Bill of Rights prevents Congress from limiting its prohibitions to those acts of force that are deliberately intended by the actor to interfere with the finite, congressionally specified set of activities or rights.

The first amendment just does not include any kind of "all or nothing" requirement.

The CHAIRMAN. Could I just inquire—and I hope that my colleagues would intervene as well, because these are complex issues, and it is difficult in trying to understand them to wait until the end, so we'll try to balance the time—just to understand, therefore, you can have intention, for example, to discriminate against someone, and that is prohibited if it is your intention in terms of firing somebody from a job; you have the intention, and then you have the action. And because you have the discriminatory intention in firing somebody, then it is a violation.

Mr. TRIBE. Well, typically under Title VII, unless you intend to fire them because of their race or sex, you are not violating anything.

The CHAIRMAN. So intentions are not being prosecuted under this statute; it is only when the intention is tied to the other kind of criteria——

Mr. TRIBE. Specific violent or otherwise physical action that interferes; that's right.

Now, there is a somewhat more serious first amendment argument that has been made—I think it is equally wrong, but I think it deserves to be addressed—and that is that, yes, it is true, Congress may focus on the wrongdoer's intention or motive, but it may not single out antiabortion motives, because doing that violates a kind of obligation of ideological neutrality.

I think the argument was made in its most forceful form by Professor Michael McConnell of Chicago in a Wall Street Journal essay on March 31. The nub of what he said is contained in just this sentence, and I quote: "Congress has selected a single point of view—opposition to abortion—and subjected it to penalties applied to no other point of view."

The problem with that objection is that it just completely misstates what this proposed bill does. It does not select a point of view at all. What it selects is a specific lawful activity—the provision of abortion services—and then it prohibits those acts and only those acts that are intended to interfere forcibly with that specific lawful activity.

Now, there are other specific lawful activities at a medical facility—for example, providing medical services for people with AIDS, or providing prenatal counseling, or providing pro-life counseling—that is certainly a fundamentally protected right—and it is true that this law does not happen to address the alleged problem of violent interference triggered by the provision of those services. But that has no constitutional significance at all.

The CHAIRMAN. Well, how do you answer, "Why shouldn't it," in terms of those who raise the issue? Why shouldn't it apply?

Mr. TRIBE. Well, I think the most fundamental answer as a matter of policy is that to require Congress to address at one and the same time all problems that anyone could imagine that are in the territory would take the problem of gridlock that already plagues this Capitol and elevate it constitutional status. It would be a prescription for constitutional deadlock if Congress, every time it addressed a given problem, had to scan the ideological horizon and address every other problem that is like it or that is its mirror image.

There is one decision, and it is very important to acknowledge it, that some people, I think, in a very tricky but ultimately vapid and empty argument, have tried to use to suggest this formula for constitutional gridlock. It is the U.S. Supreme Court's decision—I am sorry our Senators from Minnesota had to leave—that arose out of the ordinance in St. Paul, MN dealing with the problem of cross burning. It was the decision of *R.A.V.* v. *City of St. Paul* in 1992. A number of people have said that because you cannot punish particular kinds of hate speech like cross burning, hateful though they may be, by singling out that viewpoint for punishment, that it

somehow follows that any time you deal with the problem, you've got to deal with all analogous problems.

The *R.A.V.* decision from St. Paul is completely irrelevant, and I just want to say a few words about why. It dealt with the duty of Congress and of any legislature not to suppress speech, even unprotected speech like fighting words, on the basis of the viewpoint expressed by that speech. I agree with that decision—although not everybody does, I think it was right—but it has no bearing on this bill because this bill does not suppress speech; it does not even suppress conduct based upon the message that the conduct might communicate. It certainly doesn't suppress conduct based on its viewpoint.

The people who argue the other way, I think, try to make it look like this law draws a discriminatory line between abortion protesters and other protesters. This is not true. I mean, they might have a point if you passed—suppose Congress passed a law to provide that, let's say, demonstrators or marchers who carry antiabortion signs or pro-life signs, or who hand out, let's say, leaflets against going to war in Bosnia, or who make sexist remarks, must obey special federally-imposed rules of the road that would not apply to the same protesters if their signs carried some other message—a pro-life message, or a message that says if you want to stop the recurrence of the Holocaust, you must bomb Bosnia. If you had a law that in effect segregated protesters based on their message and said, You guys, because of your message, have to stay 100 yards away from the building; you have to be quiet, you have to do this, that, and the other—but you guys, we like your message; you can trespass a little, you can come right up close—that would be a different kind of law. But what this law does——

Senator GREGG. Not to be flippant, Professor, but have you explained that to the University of Pennsylvania?

Mr. TRIBE. I have been asked by the general counsel of the University of Pennsylvania certain questions, but I guess it is a matter of lawyer-client privilege—I can't say what I told him. But I think I know what you mean.

To get back to our current problem, this law's application is not triggered by whatever message you are delivering when you firebomb a building. We saw the pictures of that fire-bombed clinic. The question, if this law were in effect, wouldn't be were they carrying pro-choice signs at the time. The question wouldn't be what was the ideology that drove it—although I noticed that the witness was asked a question about whether they were pro-life activists—that wouldn't matter. The question was did they bomb the building because abortions were being provided there, or did they bomb it just out of malice, or maybe to collect on an insurance policy. This law deals only with violence that is aimed at abortion providers of abortion services, but it has absolutely nothing to do with the ideology that drives the fire bomber. We have heard here that many people with a pro-life ideology abhor that kind of violence, and I am glad to hear it; I have known it all along. So this is not about viewpoint.

The CHAIRMAN. Then, since there reportedly have been threats to priests and bishops and others, why shouldn't it be even-handed, then, and apply?

Mr. TRIBE. Why shouldn't there be another law dealing with that problem? Maybe there should.

The CHAIRMAN. Or should this one as well, be framed to do that?

Mr. TRIBE. That really goes back to my point about constitutional gridlock. There would be nothing unconstitutional about extending it, but the Constitution doesn't require you to solve more than one problem at a time.

One of the most common recurring phrases in U.S. Supreme Court opinions uttered by people on the right and left alike is that the Constitution permits legislative bodies to move one step at a time. And I would be among the first to want to help draft legislation to deal with whatever problem of violence focusing on priests or religious figures or pro-life counselors exists. All I am saying is that it is not an objection to this law either as a matter of constitutional law or as a matter of policy that Congress is dealing with this serious national problem separately.

I also want to make a point about federalism that underscores something that the Attorney General said and bears particularly on some of the questions about the labor area.

The fact is that one reason for having Federal laws not deal across the waterfront with all of these problems in the same way just because they are all dramatic, and the moment you see the pictures and the "Wanted" signs, they all elicit an emotional response, is that without looking closely at each problem, it is hard to tell to what extent it is a problem that can be dealt with adequately at the local and State level.

The fact is that until a showing has been made to the satisfaction of Congress that the capacity of State and local law enforcement is being overwhelmed the way Mr. Lasso and Dr. Rodriguez suggested that it was in this instance, overwhelmed by the attempt to control a certain kind of violence, a presumption in favor of letting the States deal with their own problems would perhaps explain why Congress would not want to deal with other analogous problems at the same time.

So my own conclusion is that——

The CHAIRMAN. And there is a whole pattern in terms of labor law, in any event, and the NLRB, going back to the 1930's, which has dealt with these issues as a different matter, in any event.

Mr. TRIBE. Yes. As Senator Wellstone pointed out—really, there were two different points made. Senator Simon made the point that, I guess in earlier hearings, there were no instances where certain kinds of violence in labor context couldn't be locally dealt with; and Senator Wellstone made the point that we have a many-decade history of a National Labor Relations Act with another separate body of Federal laws to deal with those areas where State and local law has proven insufficient in dealing with labor problems.

So I think the labor issue is really a red herring.

Senator GREGG. Excuse me, Professor. It is your position, then—so I understand it, and I presume it is logical and makes sense—that if the person who burned the clinic did so because they had been fired the day before and was actually a very pro-choice person, or just really antagonized about the way they were treated as

an employee, that this law would still be applicable to that person's act—right?

Mr. TRIBE. No. Let me answer the question, Senator Gregg, in terms of the language of the law. If you look at Section 3(a)(2), the key point would be the section that talks about someone who "intentionally damages or destroys the property of a medical facility or in which a medical facility is located, or attempts to do so, because such facility provides abortion services."

In other words, Congress has not been confronted with a rash, as it has in the Post Office context——

Senator GREGG. So there is an intent standard.

Mr. TRIBE. There is an intent standard. And the fact that something happens to be an abortion facility——

Senator GREGG. Then I misunderstand you, perhaps.

Mr. TRIBE. But my point was that there are all kinds of reasons why the person might have targeted this as an abortion clinic. That is, someone might be a mercenary with no view one way or the other, and someone says, "I'll give you $500 if you'll bomb this abortion clinic." They would be violating the law.

Senator GREGG. But if they did it as a disgruntled employee——

Mr. TRIBE. And it had nothing to do with the fact that it was an abortion clinic—that was a pure coincidence——

Senator GREGG. Fine.

Mr. TRIBE. Well, as the Attorney General I think wisely said, hypotheticals perhaps should be saved. But it seems to me that here——

Senator GREGG. But we all know that law professors deal in hypotheticals.

Mr. TRIBE. But law professors sometimes learn that hypotheticals can be tricky. And one of the tricks there is that perhaps the employee——

Senator GREGG. Do you disclose that to your students?

Mr. TRIBE. —yes, frequently—one of the problems in your hypothetical is that the dispute by the disgruntled employee might have to do with the fact that it was abortion services. And I just don't want to say that you couldn't have a situation of a disgruntled employee fitting within this law.

Senator GREGG. I understand that.

Mr. TRIBE. But the key point is that this does not make anything a thought crime; it does not pick out anything in a discriminatory way based on viewpoint. It is true that it doesn't deal with all problems at once, but in that respect it is simply respectful of federalism and of the finite attention span and resources of a busy legislative body.

I think the policy arguments for this law have been made far more eloquently by others than I could make them, and that is not my expertise anyway, but I think it is as a constitutional matter perfectly clear that it is constitutional. I'd like to just add one word about that. Questions have been raised about the supposed breadth or vagueness of the language, because it deals not only with the use of force to actually prevent someone from having an abortion, but the use of force to attempt to intimidate. Of course, that language has been for decades in the Federal criminal statute, Section 245, that protects voting rights and that protects jury services; that

language in 245(b)(1) says whoever, whether or not acting under color of law, by force or threat of force, willfully injures, intimidates—the word "intimidates" is used—or interferes with, or attempts to injure, intimidate or interfere with any person for certain reasons is violating this law. And the penalties provided are up to a year in prison, just exactly like this law.

So it seems to me that of course, it is true, that an overzealous prosecutor can run with anything, but that's what we have courts for. But this language is tried and true, and surely not unconstitutionally broad or vague.

That's really all I have, Mr. Chairman, and I'd be happy to answer any questions.

[The prepared statement of Mr. Tribe follows:]

PREPARED STATEMENT OF LAURENCE E. TRIBE

I am honored to have been invited to testify before this committee on the constitutionality of S. 636, the "Freedom of Access to Clinic Entrances Act of 1993." This year, in Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753 (1993), the Supreme Court substantially reduced the availability of Federal protection for women seeking abortions by holding that Federal courts could not use the conspiracy section of the Klu Klux Klan Act to restrict the deliberately obstructive and often violent actions of groups determined to block access to abortion clinics. In my view, Congress may constitutionally fill the gap left by Bray with the proposed clinic access bill, which is designed to protect those who seek to exercise or facilitate the constitutional right of reproductive choice. As I shall also explain, the proposed bill would not violate any provision of the Bill of Rights.

There are two affirmative sources of authority on which Congress may base this law: the Commerce Clause of Article I, §8, cl. 3 of the Constitution, and the fourteenth amendment, §5—the Enforcement Clause. After examining each in turn, I will address the first amendment arguments some have made against bills like S. 636, and will explain why they are incorrect.

I.

The proposed bill to protect access to abortion clinics is clearly authorized, as an affirmative matter, by the Commerce Clause. Congress has ample basis to find, as S. 636 would, that "medical clinics and other facilities offering abortion services have been targeted in recent years by an interstate campaign of violence and obstruction" (§2(a)(1)), and that "such conduct burdens interstate commerce, . . . by interfering with business activities of medical clinics involved in interstate commerce and by forcing women to travel from States where their access to reproductive services is obstructed to other States." (§2(a)(6)).

First, some of the women who are obstructed by clinic blockades are themselves engaged in interstate commerce by traveling from one State to obtain abortion services in another. Some women may travel interstate to find a more medically suitable clinic than is available where they reside; others live in areas where there is simply no clinic offering abortions, a situation that characterizes more than 80% of the counties in the Nation. Particularly in the aftermath of Bray, a patchwork of State and local laws and resources will be responsible for handling the militant tactics of groups willing to risk arrest and imprisonment to prevent abortions; thus the extent to which blockades are present, or are subject to effective regulation in each State, will powerfully affect the decisions women must make to travel interstate in order to obtain abortion services.

Although many of the women protected by S. 636 would, of course, not be engaging in interstate commerce, the cumulative impact, on interstate movement and commerce, of the conduct targeted by S. 636 is plainly substantial enough to justify congressional action under the Commerce Clause. After all, it has been established for half a century that Congress has authority under the Commerce Clause to regulate even the farmer who grows his own wheat and bakes his own bread simply because this purely intrastate activity, when repeated thousands or even millions of times across the Nation, can indirectly affect interstate commerce. See Wickard v. Filburn, 317 U.S. 111 (1942). Thus, once a class of activities is found to affect commerce, Congress may regulate all activities within that class—even those that, taken individually, have no interstate component and no demonstrable effect on interstate commerce. See. e.g., Perez v. United States, 402 U.S. 146, 152–54 (1971).

The pattern of interstate effects produced by the pressured movement of women from State to State under a variegated patchwork of local enforcement against blockades, violence and physical intimidation at abortion clinics is undoubtedly sufficient to warrant Congress's invocation of its commerce power. Similarly, the shift of demand for abortion services from those areas where clinic access is obstructed to those areas where it is not represents the sort of interstate economic effect that is beyond the effective control of any one State and is accordingly a proper subject for congressional regulation under the Commerce Clause. See. e.g., Summit Health. Ltd. v. Pinhas, 111 S. Ct. 1842, 1846–48 (1991) (confirming that Congress may regulate, through the antitrust laws, the economic activity of a single health care provider).

Second, it is indisputable that clinics that provide abortions necessarily operate within the stream of interstate commerce and purchase goods and services that move in interstate commerce. Just as Congress may "impose whatever conditions it wishes, so long as the conditions themselves violate no independent constitutional prohibition, on the privilege of producing for, serving customers in, or otherwise 'sitting astride the channels of, interstate commerce,'" L. Tribe, American Constitutional Law 312 (2d ed. (1988), so Congress may enact whatever protections it deems necessary, so long as those protections violate no independent constitutional prohibition, for facilities, personnel and services that utilize interstate resources, that deal with persons moving in interstate commerce, or that otherwise touch the stream of commerce. It would be unthinkable for the Supreme Court to hold that Congress may regulate the activities of abortion service providers—requiring them, for example, to comply with minimum wage and antidiscrimination laws—but may not protect those very same abortion service providers from "vandalism and destruction of property in and around the facility; bombings, arson, and murder; and other acts of force and threats of force." S. 636, §2(a)(4).

It is true that S. 636, as written, covers not only those acts of violence and intimidation which take place within the immediate vicinity of an abortion clinic; it reaches violent conduct which may be completely removed in location from any clinic but which is directed at others because they are or have been obtaining or providing abortion services. Thus, the bill's prohibitions would apply to one who used force or threat of force against a woman because she had obtained an abortion, or against a doctor in his or her home because of that doctor's role in providing abortion services. This fact, however, in no way undermines Congress's affirmative authority under the Commerce Clause to enact S. 636, since even violent activities far removed from the locus of an abortion clinic but targeting those who use its services undoubtedly have an impact both on the decision of women to travel interstate in order to obtain abortion services and on the ability of abortion service providers to function effectively.

Finally, the fact that the Freedom of Access to Clinic Entrances Act obviously has noncommercial objectives does not take it outside the Commerce Clause. The Supreme Court has made this conclusion completely clear in cases upholding child labor laws, health and safety rules, farmland conservation measures, parkland preservation laws, and other kinds of manifestly noncommercial legislation enacted to "regulate commerce." Indeed, as the committee is aware, much of the civil rights legislation of the 1960s was premised on Congress's commerce power. See Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964). Significantly, the Supreme Court relied in these cases on an analysis of interstate economic effects even though the Civil Rights Act as ultimately adopted carried no congressional findings of fact linking racial discrimination to interstate travel and commerce; the court simply took notice of the evidence before Congress at the time it enacted the legislation.

As an affirmative source of power, therefore, the Commerce Clause is clearly a sufficient basis for the Freedom of Access to Clinic Entrances Act.

II.

A second affirmative source of constitutional authority for S. 636 is Congress's power, under Section 5 of the fourteenth amendment, to enforce the provisions of that article, including the provisions dealing with "liberty," "equal protection of the laws," and "the privileges or immunities of citizens of the United States." Recently, in Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992), the Supreme Court reaffirmed its long-standing holding that a woman's decision to terminate her pregnancy prior to fetal viability is protected from State interference by the fourteenth amendment's Liberty Clause. Accordingly, Congress may properly find that the reproductive health services involved in S. 636 are in need of protection if the Liberty Clause is to be fully enforced.

By its terms, however, the fourteenth amendment restricts only State action, not purely private conduct. It would be difficult to find State action in the conduct criminalized, or made civilly actionable, by S. 636—unless one premised such a finding on the unwillingness or inability of State and local law enforcement authorities to cope with deliberate clinic—obstruction. The proposed finding that "those engaging in such tactics frequently trample police lines and barricades and overwhelm State and local law enforcement authorities and courts and their ability to restrain and enjoin unlawful conduct and prosecute those who have violated the law" (§2(a)(5)) is relevant in this regard but might well be deemed insufficient by a court reluctant to enlarge the "State action" concept. Even assuming, however, that there is no State action here, I believe that Congress nevertheless has authority to reach purely private blockades of abortion clinics, and purely private assaults on persons seeking or providing abortion services. The ability of Congress to regulate admittedly private acts under Section 5 of the fourteenth amendment requires some explanation.

In a series of post-Civil War decisions, most notably the civil rights Cases, the Supreme Court invalidated much of the Federal civil rights legislation enacted by the Reconstruction Congress on the ground that, because this legislation purported to regulate the conduct of private citizens and not simply State action, it was not authorized by the fourteenth amendment, and hence was unconstitutional. See Civil Rights Cases, 109 U.S. 3 (1883); United States v. Harris, 106 U.S. 629 (1883). When the Supreme Court began to reconsider the reach of congressional power under Section 5 of the fourteenth amendment in the 1960s, a principal issue was thought to be whether, under a new theory of congressional authority, Congress would be able to subject private conduct to statutory limitations pursuant to the fourteenth amendment's Enforcement Clause.

In the leading case on the Enforcement Clause, Katzenbach v. Morgan, 384 U.S. 641 (1966), the Court upheld, as a valid exercise of congressional power under Section 5, a provision of the Voting Rights Act of 1965 that effectively overrode New York's English literacy voting requirement for certain Puerto Rican residents of New York, even though the Court had previously ruled that enforcing this requirement does not in itself violate the Fourteenth or Fifteenth Amendment. The Court reasoned that Congress's power to enforce the fourteenth amendment is significantly broader than that of the judiciary, because Congress may determine—on the basis of its superior fact-finding capabilities and on the basis of the broader range of remedial options open to it as a legislative body—that certain measures are necessary to remove impediments to the political process, or to ensure that other Federal rights are fully secured.

Thus, in Katzenbach v. Morgan, the Court noted that, when Congress made it easier for Puerto Ricans with a specified level of schooling to vote regardless of their mastery of English or lack thereof, Congress thereby facilitated their exercise of other indisputable Federal rights, like the right not to be discriminated against on grounds of their national origin or their race in the delivery of municipal services and police protection. That principle, first established in Katzenbach, is now well accepted. As Justice O'Connor wrote more recently for a majority of the Court, "(t)he power to 'enforce'—(the provisions of the fourteenth amendment) may at times also include the power to define situations which Congress determines threaten principles of equality and to adopt prophylactic rules to deal with those situations." City of Richmond v. J.A. Croson Co., 488 U.S. 469, 490 (1989); see also City of Rome v. United States, 446 U.S. 156, 176 (1980) ("legislation enacted under the authority of §5 of the fourteenth amendment (will) be upheld so long as the Court [can] find that the enactment is 'plainly adapted to (the) end' of enforcing the Equal Protection Clause and 'is not prohibited by but is consistent with "the letter and spirit of the constitution,"' regardless of whether the practices outlawed by Congress in themselves violated the Equal Protection Clause ") (citations omitted).

During the same Term in which it decided Katzenbach v. Morgan, the Supreme Court intimated that Congress could in fact regulate at least some private conduct under the fourteenth amendment. In United States v. Guest, 383 U.S. 745 (1966), six Justices joined one or the other of two concurring opinions declaring that Congress possessed the power under §5 of the fourteenth amendment "to enact laws punishing all conspiracies to interfere with the exercise of fourteenth amendment rights, whether or not State officers or others acting under the color of State law are implicated in the conspiracy." Id. at 782 (opinion of Brennan, J., joined by Warren, C.J., and Douglas, J.); id. at 762 (Clark, J., concurring, joined by Black and Fortas, JJ.). Justice Brennan's opinion utilized an approach identical to that which he would subsequently apply in writing for the Court in Katzenbach v. Morgan: "§5 authorizes Congress to make laws that it concludes are reasonably necessary to protect a right created by and arising under that amendment; and Congress is thus

fully empowered to determine that punishment of private conspiracies interfering with the exercise of such a right is necessary to its full protection." 383 U.S. at 782 (opinion of Brennan, J.).

In dictum in District of Columbia v. Carter, 409 U.S. 418 (1973), a unanimous Supreme Court subsequently reaffirmed the proposition that to say that "[t]he fourteenth amendment itself 'erects no shield against merely private conduct' . . . is not to say . . . that Congress may not proscribe purely private conduct under §5 of the fourteenth amendment." 409 U.S. at 424 n.8. It is true that, since Guest and Katzenbach, the Court has had no occasion to confront the extent to which the State action requirement limits congressional power to enforce the fourteenth amendment. Nonetheless, it seems fairly clear that, at least in cases like Guest, congressional power exists to reach private conduct. In Guest, Justice Brennan treated the regulation of private conduct as a means which Congress adopted in order to insure that individuals would in fact be able to exercise their right to equal treatment by government, 383 U.S. at 784 (opinion of Brennan, J.); proscription of private conduct, in other words, was treated as an ancillary remedy, and thus was proper even under the narrowest reading of §5's grant of power to Congress to enforce the fourteenth amendment. Cf. Brewer v. Hoxie School District No. 46, 238 F.2d 91 (8th Cir. 1956) (Federal court has power to enjoin private action designed to prevent school boards from furnishing unsegregated education).

Thus, it is my conclusion that Congress has the authority under Section 5 of the fourteenth amendment to reach purely private conduct once Congress concludes that States and municipalities, acting alone, will be unable to provide sufficient protection against private acts that threaten the full enjoyment of Federal constitutional rights such as those reaffirmed last year in Casey. In the context of S. 636, Congress may reasonably adopt the view that, because the States are in danger of being overwhelmed in their efforts to prevent private obstruction of access to abortion clinics, and private violence against abortion seekers and providers, Congress should supplement those efforts with its own legislation under the fourteenth amendment.

III.

Some have argued that the proposed clinic access bill would violate the first amendment by creating a "thought crime" or by singling out for punishment those with an antiabortion viewpoint. In an essay in the Wall Street Journal (March 31, 1993), Professor Michael McConnell of Chicago Law School argued that legislation of this sort "criminalizes speech that is intended to 'discourage abortion.' It applies to no other speech. Other protestors who commit acts of trespass or violence—animal rights activists, antinuclear protestors, opponents of racism or sexism—are not covered by the bill, even if their protests are equally violent Congress has selected a single point of view—opposition to abortion—and subjected it to penalties applied to no other point of view." Similarly, in a National Right to Life Committee release (February 26, 1993), Douglas Johnson objected that "these penalties would not apply to those who block the doorway of a 'medical facility' in order to protest animal research, promote AIDS funding, demand national health insurance, protest unfair working conditions within the facility, or whatever. No Federal offense occurs unless the impeding is done 'with intent to prevent or discourage any person from obtaining' a 'reproductive health service' . . . . In other words, (such legislation) does not simply seek to define certain forms of conduct as Federal crimes. Rather, (it) would apply harsh Federal penalties only to those who engage in such conduct on the basis of a specific viewpoint—opposition to abortion. No conviction is possible unless the prohibited motivation is demonstrated. So, in a very real sense, (such legislation] seeks to create a Federal 'thought crime.'"

These arguments are based on a complete misreading of S. 636 and/or a serious misunderstanding of the first amendment. S. 636 does not in fact single out speech at all, nor does it even single out conduct that expresses a particular viewpoint or conduct that is driven by a specific ideology. On the contrary, the prohibition of S. 636 extends to:

> "Whoever—
>
> (1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or other person or any class of persons, from—
>
> (A) obtaining abortion services; or
>
> (B) lawfully aiding another person to obtain abortion services; or
>
> (2) intentionally damages or destroys the property of a medical facility or in which a medical facility is located, or attempts to do so, because such facility provides abortion services.

S.636, §3.

Under this prohibition, it makes no difference at all whether the interference, injury or destruction is accompanied with expressions of, or driven by a philosophical adherence to, a rights-to-life viewpoint. Indeed, someone who believes fervently in the right to abortion and obstructs clinic access simply in order to dramatize the plight of women and to underscore the need for this very legislation is no less guilty under S. 636 than is someone who engages in the very same abortion-obstructing acts in order to protect the unborn. Similarly, a mercenary who has no views either way on this subject but agrees, in return for a sum of money, to firebomb an abortion clinic or to attack a woman seeking its services is every bit as guilty under the proposed legislation as is the individual whose conscience or religious convictions motivate such acts. In these cases, it is irrelevant why someone is targeting abortion services, so long as that person's conduct is triggered by the presence of abortion. Moreover, for purposes of the bill, it is of no consequence whether the conduct which obstructs access to an abortion clinic in order to prevent women from obtaining abortions arises out of an antiabortion rally or protest, or out of some other activity initially having no relation whatever to abortion. S. 636 as written makes no distinction on the basis of the nexus between the specific actions prohibited and the antecedent or background activity surrounding those prohibited actions.

Of course, purely as a statistical or empirical matter, these instances of clinic obstruction divorced from an antiabortion viewpoint may be rare. But there is no indication either in the statute itself, or in what I believe motivates its proponents, that S. 636 is merely a pretext for punishing or suppressing antiabortion views or statements. S. 636 is written in terms that are independent of any would-be violations' views not because its authors have come up with a stratagem for defeating first amendment objections but, rather, for the simple reason that Congress's concern about clinic access is genuinely independent of what those who obstruct such access in order to prevent abortion happen to believe or choose to say.

It is crucial to recognize that nothing in the first amendment remotely shields objectively defined, nonspeech conduct from regulation simply because many or even most of those who engage in that conduct are likely to share a certain philosophy or viewpoint. So too, nothing in the first amendment prevents government from selectively protecting, from physical interference or threat, those who are attempting to obtain or provide access to a particular set of constitutionally protected services. Nor need Congress be indifferent between physical interference that just happens to prevent such access—as with a burglary-motivated mugging of a doctor who is walking to an abortion clinic after a stop at the bank—and physical interference that occurs in order to prevent access to abortion. Just as Congress can properly decide to provide protection for those who seek to exercise or facilitate the right of interstate travel, or those who seek to exercise or facilitate the right to vote on a nondiscriminatory basis, or those who seek to exercise or facilitate the right to a racially desegregated public education, so Congress can properly decide to protect those who seek to exercise or facilitate the right to terminate a pregnancy without simultaneously addressing other rights, and without simultaneously addressing purely incidental interference with the rights it has chosen to protect.

Indeed, the argument that this proposed legislation creates a "thought crime," or penalizes conduct based upon a nonprescribable viewpoint or message that such conduct expresses, would, if taken seriously, invalidate title VII and much of the existing corpus of Federal criminal civil rights legislation, the operative language of which has largely been incorporated into S. 636.

For example, 18 U.S.C. §245 makes it a crime for an individual "by force or threat of force" to willfully intimidate another person in order to prevent that person's participation in various activities (including voting and government benefits).

Similarly, 42 U.S.C. §3631 makes it a crime to interfere willfully with any person in the acquisition or occupation of a dwelling because of that person's race, color, religion, sex, handicap, familial status or national origin. Of course, most of them who violate this section are likely to be motivated by racial, religious, or sex-based bigotry—attitudes that, however hateful, are fully protected by the first amendment. But a legislature's decision to regulate conduct is not rendered suspect under the first amendment simply because those likely to engage in that conduct will, in most cases, share a racist or otherwise bigoted viewpoint. As the Supreme Court observed in the cross-burning case, R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992), "[w]here the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." Id. at 2546–47.

The Freedom of Access to Clinic Entrances Act would punish those engaged in violence and intimidation with the intent to prevent others from exercising their constitutional right to obtain or provide abortion services. Similarly, a number of exist-

ing civil rights laws punish those who engage in certain types of violent conduct with the intent to prevent the exercise of other constitutionally protected rights. Nothing in the holding or rationale of the Court's decision in R.A.V. suggests that Congress must be neutral as between acts which have the purpose of preventing people from exercising or facilitating the constitutional right to terminate a pregnancy, and acts which have no such purpose but are directed instead at preventing the exercise of other rights (e.g., the right to obtain some other medical service), or at conduct having no relation to the exercise of any Federal right at all.

Moreover, the R.A.V. decision involved expression, and the first amendment objection in that case dealt with the viewpoint discrimination built into the St. Paul ordinance as construed by the State's highest court. S. 636, in contrast, regulates only conduct, not speech or expression, and incorporates no viewpoint discrimination whatever. It simply prohibits the act of intentionally obstructing access to certain medical facilities. Unlike the ordinance struck down in R.A.V., S. 636 does not even purport to regulate expressive conduct, or conduct that inherently has a substantial expressive component. The clinic access bill does not prohibit picketing, demonstrating, speech-making, talking or otherwise expressing one's ideas, unless and until someone engages in physical conduct that is intended to prevent or punish abortion. And, to the extent that the bill might indirectly affect some protest activity, it does not do so in a viewpoint-based manner and easily satisfies the requirements set forth by the Supreme Court in United States v. O'Brien, 391 U.S. 367 (1968). In O'Brien, the Court held that a law which regulates nonspeech conduct is valid as long as (1) it serves an "important or substantial governmental interest unrelated to the suppression of free expression" and (2) the "restriction . . . is no greater than is essential to the furtherance of [the important government] interest." 391 U.S. at 376–77. Thus, any purely incidental effects which S. 636 might have on protected expressive activity such as peaceful antiabortion protests would be irrelevant for purposes of the first amendment. Nothing in the Bill of Rights prevents Congress from telling protesters, along with everyone else, that they must obey viewpoint-neutral rules against violence designed to protect those who exercise their rights.

IV.

The argument that S. 636 would create a "thought crime" and discriminate on the basis of viewpoint is substantially similar to the position adopted by the Wisconsin Supreme Court in Wisconsin v. Mitchell, No. 92–515 (argued April 21, 1993), with respect to Wisconsin's hate crimes statute, which provided for enhanced penalties where an assailant commits an assault-type crime against a victim because of the victim's race, sex, religion or other prohibited characteristic. Mitchell was a misguided decision which I fully expect the U.S. Supreme Court, either unanimously or nearly so, to reverse this June or July. As Wisconsin Supreme Court Justice Bablich pointed out in his dissent in Mitchell, the proscription in that State's hate crimes statute is no different in principle from the proscription in Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000e. In both, it is insufficient for liability that the defendant engaged in a prohibited act (an assault-type crime under the hate crimes statute, or an adverse employment decision under Title VII) against a member of a protected group (substantially the same group under both types of statutes). Rather, both statutes require a third element: that the defendant engaged in the prohibited act against the member of that protected group on the basis of (or because of) the victim's status as a member of the protected group. The same analysis holds with respect to many other civil rights statutes, such as 18 U.S.C. §242 (civil rights criminal statute), and 42 U.S.C. §1985(3) (prohibiting injury to a person or a person's property "on account of" the victim's support of a candidate in a Federal election).

In other words, selecting a victim for an adverse emnloyment decision because of his or her race is no different from selecting a victim for an assault because of his or her race, and prohibiting both—or enhancing the penalty for both—is equally constitutional. There is no persuasive basis on which to distinguish the title VII analogy. Since title VII is not distinguishable, and since it is quite inconceivable that the Supreme Court would be prepared to hold title VII unconstitutional, I am confident that the Supreme Court will uphold the hate crimes statute in Mitchell.

If that statute is upheld, the result would be both unsurprising and fully consistent with the analysis offered above as to the constitutionality of the proposed clinic access bill. For there is no real difference in principle between (1) legislative power to criminalize conduct based in part on the accused's selection of a victim in terms of that victim's race or sex or religion, and (2) legislative power to criminalize conduct based in part on whether that conduct seeks to interfere with a person because

that person seeks to exercise (or to assist another in exercising) a specific constitutional right. In both instances, the legislature is not singling out speech, punishing an act because of what it expresses, or defining the boundaries of a law's reach in terms of anyone's attitudes, viewpoints or beliefs.

As noted earlier, although it is irrelevant for purposes of S. 636 why someone decides to target abortion services as such, it does matter that that person be targeting such services because of their connection with abortion. Thus, S. 636 does not reach an individual whose physical activities happen to obstruct access to an abortion clinic but do so only because, for example, that individual is engaged in a family squabble or a labor dispute with someone who works at a place that is, incidentally, an abortion clinic. However, this fact does not undermine the bill's validity, unless one is willing to say that any inquiry into an offender's State of mind somehow renders the conduct prohibited by S. 636 a "thought crime." But this extreme theory would effectively turn into "thought crimes" much of the existing corpus of State and Federal criminal law, nearly all of which requires inquiry into the wrongdoer's State of mind to determine whether violence against another was, for example, premeditated or accidental and, if premeditated, whether it was motivated by a legislatively specified factor like the decision to victimize someone on account of race. Just as such civil rights statutes may identify as especially troublesome any violence that is triggered by the victim's race, so S.636 may identify interference with abortion services as especially troublesome when triggered by the fact of abortion. Any other view would, for example, render the Federal laws against treason unconstitutional under the first amendment, for they make criminality turn—as the body of the Constitution itself requires in Article III, §3—on intent to aid the enemy.

V.

I turn finally to the question whether S. 636's coverage of "threat[s] of force" might render it unconstitutional under the first amendment. It would not. As noted earlier, this language is identical to that in many Federal criminal civil rights laws. See, e.g., 18 U.S.C. §245 (making it a crime for a person acting alone "by force or threat of force" willfully to intimidate another person because of race, color, religion or national origin to prevent that person's exercise of various rights); 42 U.S.C. §3631 (making it a crime willfully to interfere "by force or threat of force" with any person in the acquisition or occupation of a dwelling because of that person's race, color, religion, sex, handicap, familial status or national origin). Thus, a finding that the Freedom of Access to Clinic Entrances Act's language violates the first amendment would invalidate these other laws as well. No such finding is plausible.

In several leading cases, the Supreme Court has made clear the basis upon which such statutes are fully compatible with the first amendment. In Watts v. United States, 394 U.S. 705 (1969), for example, the Court reversed a Federal conviction for threatening the President's life where the defendant merely used political hyperbole in saying, at a public rally, "If they ever make me carry a rifle, the first man I want to get in my sights is LBJ." In the course of that ruling, the Court held that intimidation by any genuine threat of violence would not be protected speech: "What is a threat must be distinguished from what is constitutionally protected speech." 394 U.S. at 707. See also United States v. Gilbert, 813 F.2d 1524, 1529 (9th Cir. 1987) (upholding the constitutionality of 42 U.S.C. §3631 under the first amendment, and finding that "[a]n illegal course of conduct is not protected by the first amendment merely because the conduct was in part carried out by language in contrast to direct action," and that "[c]ertain types of expression which by their very nature inflict injury or tend to incite an immediate breach of the peace are arguably unprotected"). The Gilbert court applied Watts and observed that "the statute's requirement of intent to intimidate serves to insulate the statute from unconstitutional application to protected speech." Gilbert, 813 F.2d at 1529. The proposed legislation, like 42 U.S.C. §3631, expressly covers only threats of force made with the specific intent to intimidate or interfere with those who seek to obtain or provide abortion services. Accordingly, there is no constitutional infirmity in the clinic access bill's extension beyond the actual use of force to include as well certain threats to use force.

VI.

Finally, beyond its compliance with the letter of the Constitution, legislation protecting women and clinic personnel from deliberate physical interference with access to abortion would in no way violate the spirit of a society tolerant of strongly opposing views, and structured along the deliberately decentralized lines of Federalism. S. 636 would include a finding that "those engaging in (violence and obstruction)

frequently trample police lines and barricades and overwhelm State and local law enforcement authorities and courts and their ability to restrain and enjoin unlawful conduct and prosecute those who have violated the law." (§2(a)(5)). The reasonableness of this finding is readily apparent. In the wake of Bray, clinics and women must now largely rely on State courts to issue injunctions and on local police to provide enforcement. But State and local authorities, which are properly sensitive to the rights of peaceful protest as well as to the rights of women seeking abortions, have at times been caught in the middle and have not always provided adequate protection for the rights of clinic patients and personnel, much as they might have wished to do so. The experience to this effect in Wichita and elsewhere sadly demonstrates that even criminal prosecution and punishment under State and local laws will often prove insufficient to deter repeated blockades and physical violence orchestrated by a widespread interstate campaign—one that goes well beyond the peaceful protest to which an open society must remain committed. Accordingly, it is fully consistent with principles both of Federalism and of free speech for Congress to enact legislation to provide Federal remedies for the victims of such recurring nationwide lawlessness. In the long run, in fact, only a nation that provides adequate remedies for such violence can be expected to provide unstinting protection for free speech.

In sum, Congress has ample authority to enact S. 636 to ensure that women, who have the theoretical right to abortion, in fact have access to that right. Moreover, this bill, physically protecting those who seek to obtain or provide abortion services, is written in a manner that avoids any violation of the first amendment's letter or spirit; it leaves antiabortion speech and peaceful protest untouched, and it is carefully designed to avoid singling out for special penalties or restrictions acts that are identified in terms of the views that such acts express or the beliefs that such acts reflect. S. 636 is therefore fully consistent with the U.S. Constitution.

Senator GREGG. I have some questions, but the chairman obviously has the floor.

The CHAIRMAN. We'll have 6 minute rounds, and I just have a few questions.

The language which we refer to as being part of the Fair Housing and other civil rights language, that has been tested, has it not, in the courts and been upheld?

Mr. TRIBE. Yes, and uniformly upheld.

The CHAIRMAN. So it is important, I think, that we understand that as a factor. Members may have some differences on that provision, but I think it is important that we understand it.

There are those who think that if this bill is passed, it will suppress antiabortion speech or chill robust debate over abortion. Your reaction?

Mr. TRIBE. Well, I don't think that it has that purpose, and I am confident that it wouldn't have that effect. I would point partly to the language that a member of this committee—I think it was Senator Simon—already pointed to, that nothing in it should be construed to prohibit expression protected by the first amendment.

Apart from that, I would point to the care and precision with which the language has been drafted. It talks only about people who, by force or threat of force or physical obstruction, intentionally injure, intimidate, or attempt to do so. No one has suggested that those things are protected by the first amendment.

Senator Mikulski's example of someone walking around with a rosary, even if, as Dr. Rodriguez said, that might make some patient nervous—and you could call him as your expert witness—but the ultimate issue would be does this statute make conduct illegal if it makes someone nervous? No. It has got to be force or threat or force or physical obstruction that intentionally injures, intimidates or interferes.

I suppose you could block access with your body while holding a rosary, and that might be physical obstruction, but I really cannot imagine how this language could be used by a prosecutor, however creative or zealous, in any successful way to inhibit protected expression—picketing, yelling, chanting, showing pictures of fetuses. I think people have a right to do that.

I agree that on all issues, and especially issues this profoundly difficult and divisive, the worst possible thing for a free society to do is to silence protest, and this law would not do that.

The CHAIRMAN. You have addressed the first amendment objections on the bill. Is there any argument in addition that the law could interfere with the free exercise of religion in the case of religiously motivated violations?

Mr. TRIBE. I don't think the argument could be made successfully. That is, the free exercise of religion, however deeply and profoundly held, does not include the right to use force or physical violence against anyone or against property. It is not that some religions might not teach that; it might be your genuine religious belief that you have an obligation to kill somebody. But that is not a defense, and this law I think doesn't take away anybodys freedom of religion. They could invoke a religious defense, but it would fail because the law is narrowly drawn to achieve a clearly compelling governmental interest. So that even if in fact a pending piece of legislation, the religious freedom act, S. 578, I believe it is, the Religious Freedom Restoration Act of 1993, even if it were passed, in the end, because it allows the Government to prevail by showing that it is using the least restrictive means of furthering a compelling interest, I think as a result of that, the Freedom of Access Act would trump the religious freedom act in a face-off between the two, and I would hope it wouldn't come to that.

The CHAIRMAN. Senator Gregg.

Senator GREGG. Can you define "willfully" for me in legal terms?

Mr. TRIBE. Well, most courts have said that willfulness requires a clear and specific intent, not just knowledge, of a foreseeable consequence, but a deliberate intent to bring about a certain result. It is not really a requirement of a subjective malice sort. That is, it doesn't say anything about the animus with which you have to act. But it has been construed ever since the 1940's, in connection with civil rights legislation, to back up the specific intent requirement. So that, for example, in your question about the disgruntled employee, because the statute uses this kind of narrowing language, the result really is that you could not convict simply because the person happened to have a dispute with an abortion facility.

Senator GREGG. Well, of course, 245 does use "willfully," but this language doesn't have "willfully" in it.

Mr. TRIBE. That's right, but "willfully" has not been thought to add anything to "intentionally" in a context like this. That is, "willful" does not mean with a kind of nasty attitude; it just means with specific intent. And laws of exactly this sort have been upheld, interpreting the word "intent" in a narrow enough way to say this.

I think out of an excess of caution, "willfully" is sometimes included, but when I have read the cases, I can't detect a scintilla of difference in the meaning that is added by the word "willfully." It just makes a little more lawyer's work to throw in another word.

Senator GREGG. Well, but when you gave a legal definition of the word "willfully," it seems to be a much stronger standard of proof than just "attempts" or "intimidates."

Mr. TRIBE. But here, the key thing isn't just "intimidate." The question is whether someone is intentionally doing something——

Senator GREGG. I understand that.

Mr. TRIBE. —because the facility provides abortion services. How do you prove that it is intentional because of that? The only way you can prove that is that that was the reason the person did it, and that is really the key to proving "willfulness" when that word is used.

Senator GREGG. Is there any place that you have seen the term "physical obstruction"? Is that somewhere in some other legislation?

Mr. TRIBE. I'd have to research it. So far, I see those words as providing an added and more concrete instance of the use of force. That is, when this statute says "force or threat of force"——

Senator GREGG. Yes; it's really a new word of art. I mean, I can understand "force" and——

Mr. TRIBE. It's not a terribly uncommon idea.

Senator GREGG. —I understand "threat of force," but when you say "physical obstruction"—well, let me ask you a hypothetical. You are the mother of a teenager, and you live in a State where there is no parental consent required, and your daughter says she is going to go and get an abortion. The mother stands at the door of the house before she leaves the house and says, "No; I don't think you should go get an abortion, and let me explain to you why." The daughter says, "No. I'm going to go and get an abortion."

Under this language—she was standing at the door—wouldn't that represent physical obstruction which intimidated?

Mr. TRIBE. I guess I would need to know more facts. And let me——

Senator GREGG. But I mean, the opportunity is there for a case; right?

Mr. TRIBE. —let me be honest with you, Senator Gregg. I don't think that the problem you pose has anything to do with the words "physical obstruction." You could get rid of those words and still give me the hypothetical.

Senator GREGG. Yes, I know.

Mr. TRIBE. That is, if you forcibly hold someone—the problem you are posing is whether there should be an exception for actions by parents. That's a different problem, I think.

Senator GREGG. No, I am not. I am just saying there is a fact pattern where I think everybody would generally say that, well, the mother has a right to get her point across to her daughter before the daughter goes for the abortion, and yet in getting her point across to her daughter, a mother speaking to a daughter, just like a priest speaking to a parishioner, is going to be fairly intimidating. And I do think that this language is vague enough to allow the opportunity—a fairly significant opportunity—for prosecution.

In your testimony, you make it clear that this is not tied to the physical location of the abortion clinic; it could clearly happen in a home, or it could happen in a church. I mean, you could find a priest being subject to this language also, who takes a parishioner

aside and says, "Hey, I understand you are going to get an abortion. Let me tell you why you shouldn't." That parishioner then potentially has been intimidated because of her religious beliefs.

Mr. TRIBE. Senator, if you want to deal with the problem of someone physically kidnapping or attacking——

Senator GREGG. I am not talking about physically kidnapping.

Mr. TRIBE. Could I answer your question?

Senator GREGG. I'm talking about——

Mr. TRIBE. Could I answer your question?

Senator GREGG. Yes, you can, but it doesn't deal with physically kidnapping.

Mr. TRIBE. I know, but my answer does.

Senator GREGG. OK.

Mr. TRIBE. That is, a law of this kind would have a gaping loophole if it did not deal with the problem of trying by physical force, away from the site of a clinic, to prevent someone from having an abortion.

Senator GREGG. I agree with that.

Mr. TRIBE. Once you draft any language to deal with that problem, any language, it is subject in extreme hypotheticals to examples in which you might not want to go ahead.

Senator GREGG. These are not extreme hypotheticals.

Mr. TRIBE. But it seems to me that it would be extreme for a prosecutor to intrude into a family squabble and to say, "Well, because you were standing in the door, ma'am, to talk to your daughter, you are violating this law." There is no language that can solve the problem of abuse of discretion, and no law to protect the pro-life side of this, either, could deal with that.

Suppose you drafted—as I gather you or Senator Coats might want to—a similar law to protect people from being physically attacked because of their pro-life views. You could then come up with a case in which a father talks to his son, who is a member of Operation Rescue, and he physically restrains him and says, "I don't want you going down to that clinic." And at that point, you would have the hypothetical: Is the father violating the law?

It seems to me that that is why we have courts, and that is why we allow people to exercise human judgment. It is possible to stretch these words that way, it is possible to stretch any words, but I don't think that any law can ever be written that is immune from that kind of possibility. That's all I was trying to say.

Senator GREGG. And I guess my point is that this language, "intimidate" and "attempt to intimidate" and "physical obstruction"—and especially "physical obstruction," I think, is a new word of art, and "intimidate" is a very ambiguous word of art——

Mr. TRIBE. But not new.

Senator GREGG. —and that we should be more specific.

Mr. TRIBE. But Senator, Section 245, for example, if you don't like the way your child is going to vote, and you sit them down for a serious talk, although they are over 18, you could have made exactly the same argument about 18 U.S.C. Section 245(b)(1); you are by force or threat of force attempting to interfere with or intimidate a person because of that person's voting.

Does that mean that Congress should not have protected voting under Section 245? I think that would be a prescription for legisla-

tive deadlock if the fact that we can imagine such hypotheticals—and they are every bit as imaginable with respect to voting as they are with respect to abortion—means that we should give up the task of legislating.

Senator GREGG. Well, nobody is suggesting we give up the task of legislating, just that we legislate with as much preciseness as possible.

Mr. TRIBE. Well, I think this law does that, and it is as precise as Section 245, which has not caused the kinds of problems you suggest.

The CHAIRMAN. Actually, "obstruction" has been used in the various legislation dealing with, for example, obstruction of justice outside of courthouses, as I understand, and other kinds of statutes as well.

Mr. TRIBE. I guess that is even a vaguer notion of obstruction than physical obstruction, perhaps. And certainly there are obstruction of justice statutes—and I'm sure that if you scan it on Lexus, you will find dozens of laws that use the phrase "physical obstruction." I cannot imagine that that's a vaguer phrase than the customary one in legislation.

The CHAIRMAN. So as far as you are aware, it is really not some new concept or new phenomenon?

Mr. TRIBE. I think it's about as carefully drawn, based on existing legislation, as I can imagine. I take it that that is where these words came from.

The CHAIRMAN. OK. Well, there may be other questions that will be submitted, and as the legislation moves along, we will be calling on you for continued advice.

Mr. TRIBE. I'd be glad to help.

The CHAIRMAN. We thank you very, very much for your excellent presentation.

Mr. TRIBE. Thank you, Senator.

The CHAIRMAN. We have a final panel—Ms. Joan Appleton, Pro Life Action Ministries, St. Paul, MN; Ms. Carol Crossed, from Rochester, NY; and Mr. Nicholas Nikas, American Family Association, Tupelo, MS.

We had expected our colleague and friend, Senator Coats, at this time, so we'll have a short recess. He expects to be here momentarily, and we'll continue with the hearing at that particular time. He indicated to us that he'd be here in a very short period of time.

So we'll recess and then continue the hearing when he returns. The committee stands in recess.

[Recess.]

The CHAIRMAN. We'll come back to order.

Senator Coats had indicated to me and to our staffs that he had intended to be here, and we have been unable to locate him or get any information from him, and we do not want to be discourteous to our witnesses, so we'll do the best we can.

We would appreciate a summation of your testimony, and we'll include all the testimonies in their entirety in the record.

We'll start off with Ms. Appleton.

STATEMENTS OF JOAN APPLETON, PRO LIFE ACTION MINISTRIES, ST. PAUL, MN; CAROL CROSSED, ROCHESTER, NY, AND NICHOLAS NIKAS, AMERICAN FAMILY ASSOCIATION, TUPELO, MS

Ms. APPLETON. My name is Joan Appleton. I am a registered nurse. I presently live in St. Paul, MN.

From November 1984 to November 1989, I lived here in the Washington, DC area and was employed by the Commonwealth Women's Clinic in Falls Church, VA. During my tenure there, I was the clinic's head nurse and was involved in all aspects of abortion services, from the initial counseling, the abortion procedure itself, postoperative recovery, and the 2-week follow-up exam.

During my time there, the clinic endured daily pro-life picketing and sidewalk counseling as well as at least five Operation Rescue-type operations. At no time did the Commonwealth Clinic experience any violence whatsoever during these rescues.

My recollection of the October 1988, December 1988 and August 1989 rescues are far different from Mr. Lasso's. I was there for all of them. I feel it necessary to tell you that no patients ever came in contact with any of the demonstrators. There were no patients inside the clinic. I was the only one ever inside the clinic, and that was to coordinate a communication system to direct patients who were scheduled for abortions that day to other clinics.

The person that Mr. Lasso referred to as being locked in a car was the one and only time that we used National Organization for Women plants, and we gave them pap smears and charged them a nickel, and we asked them to come through into the parking lot so we could show that we were still open for business, and not be lying, because we had receipts for the pap smears at that time.

The demonstrators, as I said, were peaceful. They placed themselves at the entrances to the clinic, and they either sang or prayed until they were removed by the police.

One of the reasons why there was no violence at the clinic during these rescues was the fact that we did not allow counter-demonstrators or abortion advocates to be present. Having a large clinic defense group would have been counterproductive in that it would have created more chaos and confusion and obviously more work for the police.

The only violence I have ever witnessed at an abortion clinic was this past summer, at a clinic in the St. Paul-Minneapolis area, where there was a large number of pro-abortion demonstrators, invited by the director of the clinic. I witnessed elderly pro-lifers being mocked and spat upon by the demonstrators while these elderly people were praying. I witnessed two young boys being sexually solicited by an adult pro-choice male demonstrator.

This past summer, in Robinsdale, MN, there were three arrests by the local police department for physical and sexual assaults. All three of these arrests were of abortion advocates.

As a counselor at Commonwealth Clinic, I often referred women to pro-life organizations or to the sidewalk counselors outside the clinic for help. Since we were an abortion clinic, we did not offer information regarding abortion alternatives or fetal development. Therefore, if a woman wished to keep her baby and needed help, I had to send her to the pro-life people.

This bill that is being proposed today would jeopardize the only avenue left for women to obtain alternatives to abortion and informed consent. This bill puts sidewalk counselors at risk of arrest and incarceration for 1 year, not to mention a criminal fine and a civil penalty of up to $15,000. This bill could also subject a sidewalk counselor to a Federal investigation at the whim of the abortion clinic.

All of these penalties could deter any peaceful sidewalk counselor from exercising his or her first amendment right to offer alternatives to abortion to women entering an abortion clinic. There is no doubt in my mind whatsoever that any sidewalk counselor standing on a public sidewalk can and will be accused by clinic personnel of physically obstructing or impeding access to a clinic with the intent of eliminating all pro-lifers from the vicinity of this clinic.

I would have done it during my tenure at the Commonwealth Clinic, and I have no doubt in my mind whatsoever that most clinics will also do this.

During my 5 years at Commonwealth Clinic, no one held the pro-choice banner higher than I did, but I could not ignore the effect the pro-choice movement and abortion were having on society. Women were not coming through my clinic and then pursuing careers, free from the burden of motherhood. In fact, their self-esteem and self-worth decreased more and more with each abortion, and still they continued to get pregnant. Since 1973, teenage pregnancy has continued to rise; sexually-transmitted diseases are rampant, rape and sexual assaults are increasing yearly, and an estimated 91 percent of all women who have an abortion experience some degree of psychological and emotional problems.

The CHAIRMAN. Would you like to just make a concluding comment?

Ms. APPLETON. Certainly. I presently work for Pro Life Action Ministries in St. Paul, MN, where I exercise my first amendment right to protest the killing of innocent children and the psychological and physical destruction of women. I cannot in conscience allow the continuation of the pro-abortion lies without speaking out.

You may pass laws to punish me for following my conscience because it leads me in a different direction from yours, but you cannot dictate my conscience. You do not have that power. In other words, all the laws in the world are not going to make the pro-life movement go away. As long as there are abortions, there will be someone who cares enough about the sanctity of human life to try to stop the holocaust.

Thank you.

The CHAIRMAN. Thank you very much. That really isn't what the legislation is about, but thank you.

[The prepared statement of Ms. Appleton follows:]

PREPARED STATEMENT OF JOAN APPLETON

My name is Joan Appleton. I'm a registered nurse. I presently live in St. Paul, MN. From November 1984–November 1989, I lived here in the Washington, DC area and was employed by the Commonwealth Women's Clinic in Falls Church, VA. During my tenure there, I was the clinic's head nurse and was involved in all as-

pects of the abortion services—from the initial counseling, the abortion procedure itself, post-operative recovery, and the 2 week follow up exam.

During my time there, the clinic endured daily pro-life picketing and sidewalk counseling as well as at least five rescue operations, one of which numbered 500 people. At no time did the Commonwealth Clinic experience any violence whatsoever during these rescues. The demonstrators were peaceful. They placed themselves at the entrances to the clinic and either sang or prayed until they were removed by police. One of the reasons why there was no violence at the clinic during these rescues was the fact we did not allow counter-demonstrators or abortion advocates to be present. Having a large "clinic defense" group would have been counter-productive in that it would have created more chaos and confusion and obviously more work for the police.

The only violence I have ever witnessed at an abortion clinic was this past summer at an abortion clinic in the St. Paul-Minneapolis area where there was a large number of pro-abortion demonstrators invited by the director of the clinic. I witnessed elderly pro-lifers being mocked and spat upon by the demonstrators while they were praying. I witnessed two young boys being sexually solicited by an adult pro-choice male demonstrator. This past in Robbinsdale, MN, there were three arrests by the local police department for physical and sexual assaults. All three of these arrests were of abortion advocates.

As a counselor at Commonwealth Clinic, I often referred women to pro-life organizations or to the sidewalk counselors outside the clinic for help. Since we were an abortion clinic, we did not offer information regarding abortion alternatives or fetal development. There fore, if a women wished to keep her baby and needed help, I had to send here to the pro-life people.

This bill that is being proposed today would jeopardize the only avenue left for women to obtain alternatives to abortion and informed consent. This bill puts sidewalk counselors at risk of arrest and incarceration for 1 year, not to mention a criminal fine and a civil penalty of up to $15,000. This bill could also subject a sidewalk counselor to a Federal investigation at the whim of the abortion clinic. All of these penalties could deter any peaceful sidewalk counselor from exercising his or her first amendment right to offer alternatives to abortion to women entering an abortion clinic. There is no doubt in my mind, whatsoever, that any sidewalk counselor, standing on a public sidewalk, can and will be accused by clinic personnel of physically obstructing or impeding access to a clinic with the intent of eliminating all pro-lifers from the vicinity of the clinic.

During my 5 years at Commonwealth Clinic no one held the pro-choice banner higher than I did. But I could not ignore the effect the pro-choice movement and abortion were having on society. Women were not coming through my clinic and then pursuing careers free from the burden of motherhood. In fact, their self-esteem and self-worth decreased more and more with each abortion and still they continued to get pregnant. Since 1973, teenage pregnancy has continued to rise, sexually transmitted diseases are rampant, rape and sexual assault are increasing yearly and an estimated 91% of all women who have an abortion experience some degree of psychological and emotional problems (this statistic is from Planned Parenthood's Guttmacher Institute).

I then experienced an abortion procedure with the use of an ultrasound. I was able to see for myself the baby actually struggle to pull away from the suction tube. With this experience and the knowledge of the damage abortion has caused women, I was no longer able to carry the pro-choice banner.

It just does not make sense to pass bills to protect this abortion monster those of us in the feminist movement have created if it is detrimental to women, men and of course the lives of unborn children.

I presently work for Pro-Life Action Ministries in St. Paul, MN where I exercise my first amendment right to protest the killing of innocent children and the psychological and physical destruction of women. I cannot in conscience allow the continuation of the pro-abortion lies without speaking out. You may pass laws to punish me for following my conscience because it leads me in a different direction than yours, but you cannot dictate my conscience. You do not have that power. In other words, all the laws in the world are not going to make the pro-life move go away. As long as there are abortions, there will be someone who cares enough about the sanctity of human life to try to stop the holocaust.

Thank you.

The CHAIRMAN. Ms. Crossed, if you'd be good enough, we'll try and follow a 5-minute rule.

Ms. CROSSED. The dilemma posed by the Freedom of Access to Clinic Entrances Act is no better stated than in this lead paragraph from In These Times, a progressive political newspaper in Chicago. It says: "Our reaction to scenes of antiabortionists engaging in civil disobedience outside abortion clinics is probably similar to that of many of us on the left: 'What are they doing using our tactics?' One major factor may be uncomfortable for many of us to admit: Many of them are us."

My name is Carol Crossed, and I live in Rochester, NY with my husband Richard. We are parents of six children. I taught in elementary school in Kentucky and in Maryland. My remarks here are my own, and do not represent the groups with which I am affiliated.

Our family has been a kind of halfway home for women in transition, many of whom are experiencing an unwanted pregnancy.

I am also a volunteer legislative coordinator in New York State for Bread For the World, a citizens lobby group that changes public policy on domestic and international hunger issues. I am a member of Feminists for Life of America, and also executive director of a network of over 85 organizations that link the violence of war, abortion, the death penalty, racism, euthanasia, and economic injustice. This is known as the "consistent life ethic."

In the last 27 years, I have risked arrest around issues of civil rights in the sixties, anti-Vietnam War in the seventies, sleeping outside on the steps of the Rochester City Hall to call attention to the plight of homelessness.

One of my last arrests was in opposition to the Gulf War.

Of my approximately 15 arrests, five included sit-ins at abortion clinics.

Uniting life issues is a new movement that believes war and abortion and poverty are based on the same mentality, that human life is expandable by the millions. For instance, we have to ask ourselves how long can you, Senator, work to increase subsidies in the WIC program for women and their unborn children and then support the termination of those same unborn children by a suction machine.

As a feminist, I take a particular interest in issues that exploit and oppress women and children. Abortion rights violates tenets upon which the feminist movement was founded: nonviolence, ecology, conflict resolution, and community.

My studies of Ghandi are the basis for my actions. I believe I am part, we are all part, of the reason why any woman has an abortion. It is a negative choice, a choice to kill, because one of us, and all of us, have not loved enough.

Before addressing the specifics of S. 636, some observations need to be made regarding the language of the bill. Mark Twain said—it sounds more like Sam Ervin—"The difference between the right word and almost the right word is the difference between lightning and the lightning bug." For the record, I do not oppose the right to reproductive health services. I believe one has the right to reproduce or to not reproduce. This language is intellectually dishonest and suggests that those who would oppose this bill are antibirth control, or antisex frigid fanatics. Abortion, the tearing of unborn life from limb to limb, is not healthy or is not a "service."

Who are we kidding here? For every two healthy people who enter an abortion clinic, only one comes out alive. The bill, number one, unfairly discriminates against protesters with a particular viewpoint. For instance, if I am blocking the entrance to a medical facility because I oppose animal research being done there, or oppose research on chemicals designed to eliminate humans in warfare, the sentence for being civilly disobedient in those cases would be far less than if I were doing the same action in opposition to the taking of human life in abortion.

Our signs would actually say the same thing: Taking a life stops a beating heart. But if I were there to protect animals, I would not get as severe a penalty. This is discrimination based on the content of my message.

The bill, second, lumps together with no distinction whatsoever lawless terrorism, like those that have been mentioned here, which I totally oppose, with peaceful civil disobedience. Our American tradition of nonviolent civil disobedience is as old as the antislavery movement, when blacks were considered nonpersons. It is as old as the suffragette movement, when women were considered the property of their husbands.

Third, the language, "intimidate" and "interfere" is vague and subject to the interpretation of the recipient of the message. Sitting in silence, standing with a sign, "Abortion is War on the Womb," could be interpreted as intimidation if one's conscience is simply challenged by the message. In fact, this is precisely the point in carrying any sign at any protest.

We in the pro-peace and pro-justice movement have called this "consciousness raising," not "intimidation." Ghandi calls it "creating tension," not "intimidation." Martin Luther King called it "disturbing a negative peace."

In the spirit and in actuality, this bill is nothing more than a hate crime against pro-life people.

In closing, we are becoming a nation reduced to the words of a bumper sticker: "Choose Choice." Never mind that the choice maims or kills another human being. The "If you don't' want an abortion, then don't have one," mentality has spawned the "If you don't like irradiated food, then don't eat it" group.

We have lost a sense of community in our country, and in closing, I would like to say that equal responsibility is becoming equal irresponsibility.

Thank you.

The CHAIRMAN. Thank you.

[The prepared statement of Ms. Crossed follows:]

PREPARED STATEMENT OF CAROL CROSSED

The dilemma posed by The Freedom of Access to Clinic Entrance Bill is no better stated than in this lead paragraph from IN THESE TIMES, a progressive political Newspaper in Chicago:

"Our reaction to scenes of anti-abortion activists engaging in civil disobedience outside abortion clinics is probably similar to that of many on the left: 'What are they doing using our tactics?' One major factor may be uncomfortable for many of us to admit: many of them are us!" (Nanlouise Wolfe and Stephen Zunes, IN THESE TIMES, March 29-April 4, 1989. Emphasis theirs.)

My name is Carol Crossed and I live in Rochester NY with my husband Richard. We are parents of 6 children, ages 17-27. I taught in elementary schools in Louisville KY and Piscataway MD. My remarks here are my own and do not represent the groups with which I am affiliated.

Our family has been a kind of half-way home for women in transition, many who have been carrying children who were not planned.

I am a volunteer legislative coordinator for Bread For the World, citizens' lobby group that changes public policy on domestic and international hunger issues; an active member of Common Ground of Upstate New York; and a member of Feminists For Life of Western New York. I am the volunteer Executive Director of The Seamless Garment Network, a group of over 85 national organizations that addresses the violence of war, abortion, the death penalty, racism, euthanasia and economic injustice.

In the last 27 years, I have engaged in civil disobedience and risked arrest in over 20 demonstrations and protests around issues as varied as civil rights in Washington, DC, anti-Viet Nam war protests, and sleeping outside on the steps of the Rochester City Hall to call attention to the plight of homelessness. My approx. 15 arrests include a sit-in at Congressperson Eckert's office in

opposition to Contra Aid; several times at the Seneca Army Depot where I helped raise the funds for the Women's Peace encampment there; I was arrested in 1989 in front of the White House, blocking traffic in opposition to The United States involvement in El Salvador. In addition, I have been arrested 5 times at abortion clinic sit-ins. My last two arrests were on January 11, 1991 protesting the horror of the Gulf War (5 of the 11 had participated in abortion sit-ins.) and in April of last year at the Spring Of Life rescue in Buffalo NY.

ABORTION AND CONSISTENT LIFE ETHIC

Uniting life issues is a new movement of people addressing violence in a connected way. It says war and abortion and poverty are based on the same mentality: that human life is expendable... by the millions.

For instance, we have to ask ourselves how long can we work to increase subsidies to the WIC Program for women and their unborn children, and then support the termination of those same unborn children by a suction machine.

How can we/I work to abolish the death penalty, a punishment I don't believe is humane for those guilty of even the most heinous crimes, but then allow millions of innocent human beings to die through the intrauterine execution of abortion?

My first rescue was because of an invitation by an acquaintance in 1989. The newspaper told me how judgmental and harassing these people were, and my giving sideline tips on non-violence tactics prompted this invitation, which I reluctantly accepted.

What I discovered during that 6 hour ordeal and the trial that followed was that these pro-lifers in their purity and absolute abandonment 'knew' far more about non-violence than I did. I learned more from them than I had within the peace movement for 15 years.

The difference was in their genuine concern and focus on the child and her mother. There was nothing even remotely resembling

anger or hate toward the abortionist. While the leaders had to some extent political motivations as well as to intercept the evil of abortion, the other 43 were devoid of any political intent. This is a purity almost nonexistent in the peace and justice movement, where publicity and long-term effectiveness are often central to an action.(These objectives are not out of sync with Gandhian principles of non-violence)

Rescues are not a monolithic expression by a singular group. Many leaders are feminists, some Quakers, some are pacifist Catholic Workers who espouse the 'personalism' of Dorothy Day.

MY MOTIVATION FOR CIVIL DISOBEDIENCE

As a feminist, I take a particular interest in issues that exploit and oppress women and children. Abortion rights violates tenets upon which the feminist movement was founded: non-violence, ecology, conflict resolution, and community.

*Non-violence, because abortion destroys life and destroys it directly and deliberately. Feminists have always been the leaders in the anti-war and pro-justice movements. Our feminist foremothers opposed both abortion and war, not only out of concern for the physical safety, but because in both instances, it was an exercise in control and domination of a more powerful group. Elizabeth Cady Stanton said, "When we consider that women have been treated as the property of men, it is degrading to treat our children as property to be disposed of as we see fit."(Letter to Julia Ward Howe, 1868)

*Ecology, because the scraping away at one's womb is unnatural and a disrespect for bodily integrity.

*Community, because abortion is an abnegation of our collective responsibility to one another. It is abject isolation of all that women deserve in the name of their children.

*Conflict resolution, because no conflict is resolved peacefully or even at all, when one party to the conflict, i.e. the unborn child, is deliberately destroyed. This is the opposite of consensus building.

Gandhi is my mentor in non-violent direct action. In his book "All Men Are Brothers" he stated,"Surely abortion would be a crime. Gandhi's first principle of valid political action was non-cooperation. Gandhi said, "The cause of liberty becomes a mockery if the price to be paid is the wholesale destruction of those who are to enjoy liberty."

What Gandhi called for and sometimes achieved was a struggle within each person's soul to take responsibility for the evil in which it was complicit, and haven taken responsibility, to exercise self-control and begin to change. Giving up on our responsibility for evil means we also give up the possibility for changing it.

I believe I am part, we are part, of the reason why any woman has an abortion. It is a negative choice, a choice to kill, because one of us, all of us, have not loved enough.

One of the tenets of the defense of necessity in the cases of civil disobedience is that alternative means have not been successful. Pro-life people's efforts to provide alternatives to abortion are thwarted...by pro-abortion rights groups themselves. Advocates for 'Choice' continue to block access to information about alternatives to abortion.

For instance in Rochester NY, students from the University of Rochester last year picketed a center that offered clothing, free medical services from doctors in the area, and adoption information for no other apparent reason than that these services were being offered by pro-life people.

And last February, 1992, Feminists For Life of Western NY rented billboard space advertising a phone number to call for women in a crisis pregnancy. After 2 weeks, the phone number on the sign was blacked-out. After money was raised to repaint the sign, it was vandalized three additional times within a 2 month period.

S. 636, THE FREEDOM OF ACCESS TO CLINIC ENTRANCE

Before addressing specifics of S. 636 some observations need to be made regarding the language of the bill.

For the record, I do not oppose the right to "reproductive health services". I believe one has the right to reproduce or not to reproduce. This language is intellectually dishonest and suggests that those who would oppose this bill are anti-birth control or anti-sex frigid fanatics. Mark Twain said, "The difference between the right word and almost the right word, is the difference between lightning and the lightening bug."

Abortion, the tearing of unborn life from limb to limb, is not healthy or a 'service'. Who are we kidding here? For every two healthy people who enter an abortion clinic, only one comes out alive.

The purposes as outlined in the rationale for the Bill are to allow women to receive 'vital' reproductive services. The Dictionary definition has two meanings for the word 'vital':1.) necessary to life, which more than 99% of abortions are not; and 2.) Causing death, failure, or ruin, as in a vital wound. Which of these definitions is the bill's meaning? All good people of conscience would be compelled to participate in affirming life in either scenario.

We in the anti-war movement are used to this kind of 'Madison Avenue public relations moral hygiene'(Saul Alinsky,s deacription). I am rather ashamed on behalf of my fellow Democratic party members of the Judiciary for this kind of linguistic subterfuge. For instance, we all know what 'incidence of friendly fire' mean. It is less offensive language than guts and blood spilled on the battlefield.

S.636 subjects special federal penalties to anyone who "by force, or threat of force, or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with"...abortion.

1.) The bill unfairly discriminates against protestors with a particular viewpoint. For instance, if I am blocking the entrance to a medical facility because I oppose animal research being done there, or oppose research on chemicals designed to eliminate humans

in warfare, the sentence for being civilly disobedient would be far less than if I was doing the same action in opposition to the taking of human life in abortion. This is discrimination based on the content of my message.

2.)The bill lumps together, with no distinction whatsoever, lawless terrorism with peaceful civil disobedience. Our American tradition of non-violent civil disobedience is as old as the anti-slavery movement when Blacks were considered non persons; the suffragette movement, when women were considered the property of their husbands; the lunch counter sit-ins in the mid 60's and war resisters of the '70's.

Each one of us, if we look into our ancestral history will find some group who supported our rights as an underclass against the rights of a more powerful class.

My maternal Grandmother was Mary Risen, the daughter of Cherokee parents who lived with my family in Kentucky during my teen years. Until the time of the Cherokees' forced exile across the Mississippi, the Moravians, a religious sect helped to advocate on their/our behalf. Eleven missionaries refused to cooperate with a Georgia State law that refused to recognize Cherokees. Samuel Worchester and Elizur Butler were each sentenced to 4 years in jail for their refusal to abide by an unjust law that "seemed to deny that Indians were human beings."(quote by General Scott, 1935, Journal of Cherokee Studies 3.3 (1978): 148.).(Atlanta Journal and Constitution, May 17, 1987, p.E-2)

(At another place and time, I would humbly suggest that any of my liberal progressive colleagues here were subjected to the same discriminating bias against their cause and manifested by a 'law' that would subdue their rights to free speech. Sam Adams is an example. As a supporter of the American Revolution, he rallied around the success of it. But Samuel Adams was in the forefront of demanding the death penalty for those who participated in Shays' rebellion, accusing them of engaging in revolution against Americans.)

'Physical obstruction' can be done by sitting in silence and singing, or by blowing up the door. I'm no expert in the law, but my guess is that terrorism is already covered by criminal statutes. This bill's intent connects the pro-life movement with 'bombings' and 'murder' neither of which is ever sponsored by or supported by the pro-life movement.

The horrible tragedy of David Gunn was not the act of the rescue movement. It is a sad truth of history that great moral movements attract people who use it to act out their own hostility.

*The peace movement of the '60's was a true protest against the violence of war, but an unfortunate researcher was killed in the bombing of a university center, by someone who claimed to be working in the anti-war cause;

*Many good people are working for the cause of equality in Northern Ireland, and few of them sympathize with the violent men who set off a bomb in England and killed a three year old boy.

*Good people of all faiths are working for justice for Palestinians in the occupied territories. The overwhelming majority of them are revolted by the bombing and killing at the World Trade Center.

3.) The language 'intimidate', and 'interfere' is vague and subject to the interpretation of the recipient of the message being conveyed. Sitting in silence, standing with a sign ABORTION STOPS A BEATING HEART could be interpreted as 'intimidation' if one's conscience is simply challenged by the message. (In fact, this is precisely the point in carrying any sign at a protest.)

Any peaceful protest, lawful or illegal can often seem intimidating. We in the pro-peace and pro-justice movement call this 'consciousness-raising'. Gandhi calls 'creating tension'. Martin Luther King called it disturbing a negative peace.

To give an example, at the Nevada Nuclear Test Site, twice I sat in the road to say 'no more' on behalf of the future victims of a nuclear Holocaust. The workers from inside the site lined up on the side of the road and carried signs and shouted that who were we

to pass judgement on them. They were just trying to earn a living, a meager one at that. There were no jobs out there and their families needed to be supported. Even though I sat in the road in silence, my presence and the presence of those offering literature on peaceful alternative employment was probably 'intimidating'.

4.) The word 'attempts to ...intimidate or interfere with... gives license to press charges for practically speaking, any method of expressing opposition to abortion. A sign TAKING A LIFE STOPS A BEATING HEART can be said to attempt to interfere with a person entering the medical facility for an abortion since it is designed to dissuade the person from entering.

But the same sign TAKING A LIFE STOPS A BEATING HEART used by the same person in the same manner the next day would not be subject to excessive penalties if the motivation of the person was to oppose animal research.

5.) Broad wording of the bill could discourage constitutionally guaranteed free speech, which was alluded to in the Washington Post Editorial (3/29/93):"lawmakers with any concern for civil liberties will proceed carefully in this area."

6.)The bill is further biased in favor of pro-abortion rights protestors since they would continue to legally harass and abuse pro-lifers. Pro-lifers participating in peaceful civil disobedience already expect to be arrested for civil disobedience. This bill makes the penalties much steeper for something they in conscience are already prepared to accept, but makes no penalties for those abuses to them.

Incidents of violence by abortion rights activists include

*February, 1993, the Gainsville, FL Right-to-Life building was firebombed for the 4th time;(Gainsville Sun, 2/14/93)

*January, 1993, in Clive, Iowa, a pro-life organizer was arrested for punching a pro-life organizer and damaging his car;(Des Moines Register, 1/27/93)

*January, 1993, Pro-abortion extremists vandalized the offices of Nebraska Right to Life.

*January, 1993, damages were awarded to 2 pro-life demonstrators who were assaulted by a clinic abortionist.(Asbury Park Press, 4/12/93)

In the spirit and in actuality this bill is nothing more than a 'hate-crime' against pro-life people.

In closing we are becoming a nation reduced to the words of a bumper sticker, "CHOOSE CHOICE". Nevermind that the choice maims or kills another human being. The 'If you don't want an abortion then don't have one' mentality has spawned the 'If you don't like irradiated food, don't eat it' group.

Equal responsibility is becoming equal irresponsibility.

The CHAIRMAN. Mr. Nikas.

Mr. NIKAS. Mr. Chairman, this bill is a nuclear warhead in the arsenal of the pro-abortion industry. It would suppress and chill not only violence, but legitimate first amendment protected speech. It singles out pro-life motivation, and it fails to address the problem of pro-abortion violence.

Mr. Chairman, as an attorney for the American Family Association Law Center, I have represented pro-life Americans for the last 2½ years. I have represented Americans from every region of the country. Most Americans who are pro-life do not maim or kill or bomb or engage in any act of violence.

What do they do? They pray. They picket. They sidewalk counsel. They try to hand out literature talking about options to abortion. Most importantly, they speak words to women, clinic personnel and others, words calculated to penetrate the hearts and minds of those who week to bring about the death of unborn children; words that unequivocally State that the practice of human abortion is an American-sponsored holocaust and that, yes, an unborn child dies when a pregnancy is "terminated" by a woman exercising her "choice."

And Mr. Chairman, it is these pro-life words that I believe are the true impetus behind Senate bill 636 and the reason ultimately why it is fatally flawed. Indeed, in my experience, learned from both the courtroom and the sidewalk, those who make up the abortion industry and their allies become enraged and incensed when fellow American citizens exercise their constitutionally-protected freedoms to sharply and pointedly condemn the act of abortion.

However, the abortion industry cannot insulate itself from criticism. Now, I have listened to all the witnesses, Mr. Chairman, and there seems to be agreement. The pro-lifers say violence is wrong, and pro-choicers say that everyone has a right to picket and to pray and to yell and to chant and to distribute literature.

The problem with Senate bill 636 is that the key operative, substantive terms are undefined. And I will guarantee 100 percent that pro-abortion plaintiffs will use that language to suppress legitimate speech. Let me give you an example.

Section 3 of Senate bill 636 provides that anyone who, by physical obstruction, intimidates or interferes with a person because that person is going to have an abortion or seek abortion services shall be subject to the penalties in the bill.

Now, Mr. Chairman, we have heard all theory the whole hearing. Let me tell you what goes on in reality. A woman goes out who is pro-life. She has a pamphlet in her hand. She wants to hand it to a woman going into an abortion clinic. If she steps momentarily in front of that woman, this bill is not so narrowly drafted that it would not necessarily apply to that woman. That is, a woman who is handing a leaflet out to a woman going in for an abortion could easily be hit with the draconian penalties in this bill. In fact, Mr. Chairman, if this type of legislation were around in the late fifties and sixties, there would be no civil rights movement, because the penalties here are so oppressive that no one would risk it. And that's my problem with what Professor Tribe and others and, in fact, the Attorney General, have said. They have said, well, you can never be sure what an overzealous prosecutor can do, and that's

why we have courts. But there isn't an average pro-lifer who can afford to risk being hit with the draconian penalties to determine whether, oh, yes, the Attorney General was right or the Attorney General was wrong about whether stepping in front to hand out literature is a violation of this bill.

Mr. Chairman, here is another key problem with this bill. The word "intimidate" is not defined. In every abortion case I have ever been involved with, the pro-abortion plaintiffs always, always, always accuse pro-lifers of intimidation—not simply when they act unlawfully, but because of their speech.

In my written testimony, which the committee has, I mention a woman in Billings, MT who prayed the rosary outside of an abortion clinic. In a full-day Federal court hearing, the abortion clinic conceded that if the woman had had a pro-choice sign or a "save the whales" sign, she would not have been arrested; they would not have sought to have her held in contempt for a violation of the injunction.

Mr. Chairman, free speech is a fundamental constitutional right. I would even suggest that it is even more fundamental than the right to abortion, because after Webster and the Casey decisions, the right to an abortion is a liberty interest, and if you are going to balance a fundamental constitutional right against a liberty interest, the fundamental right to free speech must always win.

The CHAIRMAN. Do you have a concluding comment, if you would, please?

Mr. NIKAS. I do. Just three quick points. One, as has been pointed out, this bill is not limited to clinic entrances, and the example that Senator Gregg, I believe, gave about a mother or father blocking the door in their own home to talk to their daughter, that is not an outrageous hypothetical. This bill is not limited, and that parent could easily be sanctioned under this bill.

I believe this bill does engage in a bias mode of discrimination in contravention to the U.S. Supreme Court decision in *R.A.V.* v. *City of St. Paul,* and therefore is unconstitutional on that ground on its face.

And finally, Mr. Chairman, if you are going to pass this bill—and I think it is a terrible bill because it chills first amendment rights—make sure that the pro-abortion advocates are covered by this bill, because they engage in the most obscene and lewd and vulgar conduct, constantly—speech of a nature which I wouldn't even want to discuss in public, but I will, if you would like me to answer questions. They use blasphemy, they use sexual gestures, lewd conduct; they spit on people; they scream. They do everything that pro-lifers are accused of.

So as a matter of fundamental fairness, this bill must cover both pro-abortion and pro-life advocates.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Nikas follows:]

PREPARED STATEMENT OF NIKOLAS T. NIKAS

I. INTRODUCTION

I have been asked to testify on the effect that S. 636 would have on the efforts of pro-life Americans who peacefully exercise their First Amendment right to morally persuade all citizens that the practice of human abortion is an atrocity. As an attorney for the American Family Association Law Center, I have represented pro-life Americans for the last two and a half years. I have represented pro-life Americans from most regions of the country, including the states of California, Louisiana, New York, South Carolina, Montana and Mississippi. Some of these clients have experienced the full force of the government's police power because their political/religious views compelled them to peacefully express their opposition to abortion.

During these last several years as a pro-life attorney, I have seen the faces and heard the stories of many pro-life Americans. Who are they? They are Catholics, Mormons, Protestants and Jews; they are women and men of all ages, races, levels of education and occupations. They are grandmothers and grandfathers, teenagers, newlyweds and singles; they are poor, wealthy and from the middle class; they come from the North, the East, from the deep South and the New South, from the Midwest and the West Coast. In short, they, to borrow a phrase, "look like America."

Because of the well-documented "pro-abortion" bias of the media, one who relies solely on newspaper accounts or television "sound-bites" will undoubtedly have a distorted and false view of the conduct of the vast majority of pro-life Americans as they exercise their constitutional right to dissent from the status quo of legalized abortion. Contrary to the picture presented by the national press, (or the description in the Congressional Statement of Findings set forth in section 2(a)(4) of S.636), the typical pro-life American has never assaulted anyone, be they the women seeking to abort their unborn children, abortion clinic personnel or law enforcement officers. They have never vandalized or

destroyed any property. They have never bombed or set fire to an abortion clinic. Some pro-abortion groups have, unfortunately, tried to exploit the killing of Dr. Gunn by engaging in a campaign that paints all pro-lifers as "terrorists" ready to kill, bomb or torch anyone or any structure associated with the abortion industry. Such a charge is a flagrant lie.

Since we are discussing violence, let me state for the record that the American Family Association has unequivocally condemned the killing of Dr. Gunn. We believe that all human life is sacred, not only the life of the unborn, but the lives of those who perform abortions as well.

Not all Moslems can justly be labeled as terrorists because the bombing of the World Trading Center was carried out by a few Moslems; not all African-Americans can justly be labeled as rioters and looters in the aftermath of the Los Angeles riots; and, not all pro-life Americans can justly be labeled as vandals, destroyers, bombers, arsonists or murderers because of the act of one tortured individual. (cf. S.636, section 2(a)(4)).

What do most pro-life Americans do when they exercise their constitutional rights outside an abortion center? They peacefully pray on the public sidewalk; they carry picket signs that spell out for everyone to see their views on this most important of public issues; they distribute literature detailing the stages of fetal development and the effects of abortion on the unborn child, the child's mother, father and others related to the child. They attempt to speak with women going into the abortion clinic; try to assure them that alternatives exist and that no matter what has driven them to the desperate act of abortion, hope and support are available.

Most importantly, they speak words to women, clinic personnel and others. Words calculated to penetrate the hearts and minds of those who seek to bring about the death of unborn children. Words that unequivocally state that the practice of human abortion is an American-sponsored holocaust and that, yes, an unborn child dies

when a pregnancy is "terminated" by a woman exercising her "choice." It is these pro-life words that are, I believe, the true impetus behind S.636 and the reason, ultimately, why S.636 is fatally flawed.

Indeed, it is my experience, learned from both the courtroom and the sidewalk, that those who make up the abortion industry and their allies, become enraged and incensed when fellow American citizens exercise their constitutionally protected freedoms to sharply and pointedly condemn the act of abortion.

But it is fundamental to our form of democratic government that neither the abortionist, nor his or her staff, nor the woman seeking to abort, have a legal right to be insulated from such criticism. Thus, the United States Supreme Court has repeatedly stated that debate on issues of national concern like abortion operate at the "core" of the First Amendment and that such debate should be "unlimited, robust, and wide-open." See, e.g., NAACP v. Claiborne Hardware, 458 U.S. 886 (1982); Boos v. Barry, 485 U.S. 312, 318 (1988).

However, it is exactly such robust and wide-open debate that triggers the enmity of the abortion industry. Thus, in lawsuit after lawsuit brought by abortion clinics, the peaceful prayer of pro-lifers is described negatively as "chanting;" the peaceful carrying of a placard with a pro-life message on a public sidewalk is characterized as "obstruction of access" and the attempts at verbal dialogue and moral persuasion become "harassment" and "intimidation."

I cannot overstate this point: the abortion industry literally "hates" the message of pro-life Americans and seeks to either suppress pro-life speech or insulate its business, personnel and clients from such criticism, or, ideally, to do both.

II. S.636 IS OVERBROAD AND VAGUE AND WOULD RESULT IN THE SUPPRESSION OF PROTECTED SPEECH AND EXPRESSIVE CONDUCT

If enacted, S.636 would undoubtedly both suppress pro-life speech and insulate the abortion industry, its personnel and clients from hearing the pro-life message. Indeed, S.636's key

provisions are so broad and vague and the penalties so draconian that not only unlawful conduct but most protected expression and expressive conduct would effectively be censored. Let me explain.

Section 3 of S.636 provides that anyone who "by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been. . . obtaining abortion services [or] lawfully aiding another person to obtain abortion services" shall be subject to the penalties set forth in the bill.

I am not primarily concerned with the portions of section 3 that discuss "force" or "threat of force," "injure" or "attempt to injure," although these terms (like all the other substantive terms) are undefined. To the extent that these terms might be interpreted narrowly so as to require some type of assault or battery or similar violent act, they are unnecessary because one, every State already has criminal prohibitions against such conduct (for example, assault and battery, aggravated assault, etc.) and, therefore, such prohibitions are redundant, and two, very few pro-life Americans ever engage in such conduct. To the extent, however, that these provisions would apply to "vehement, caustic and sometimes unpleasantly sharp" N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964), pro-life speech uttered in the heat of a highly charged environment such provision would be unconstitutional. As the Supreme Court has recognized, "[s]trong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases." NAACP v. Claiborne Hardware Co., 458 U.S. 886, 928; see also id. at 927 ("mere advocacy of the use of force or violence does not remove speech from the protection of the First Amendment") (emphasis in original). Accord, American Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323, 333 (7th Cir. 1985), affirmed, 475 U.S. 1001 (1986) (speech that does not cause immediate injury may not be penalized).

Of even graver concern to all Americans who believe that debate on issues of public importance should be "uninhibited, robust and wide-open" are the provisions of section 3 that purport to prohibit "physical obstruction" "intimidation," or "interference." These provisions are defective for several reasons.

A. S.636 Employs Broad, Vague Language; Furthermore, Pro-Abortion Plaintiffs Will Undoubtedly Seek the Widest Possible Application of Such Undefined Terms

S.636 purports to prohibit unlawful conduct, violence and obstruction. However, the broad, vague and undefined language employed in the bill -- what do "physical obstruction," "intimidate" and "interfere" mean? -- will be a temptation to pro-abortion plaintiffs to argue that such language should be interpreted expansively. In my experience, it will be a temptation to which they will succumb. Indeed, in every abortion case that I have ever participated in, or heard about, it is a certainty that the pro-abortion plaintiffs will vigorously attempt to impose sweeping limitations on pro-life expression. I believe that those who operate and support the abortion industry will not be content until they silence all public opposition to abortion. This goal of complete censorship is being accomplished systematically as case-by-case, pro-abortion plaintiffs close off, one by one, every remaining public forum for pro-life speech and expressive conduct. Today's "alternative public forum" is tomorrow's lawsuit. Let me explain.

Approximately fourteen years ago, the California Supreme Court decided that the California state constitution provided broader protection for free speech in areas open to the general public than the federal Constitution. Robins v. Pruneyard Shopping Center, 23 Cal.3d 899, 153 Cal.Rptr. 854 (1979), affirmed, Pruneyard Shopping Center v. Robbins, 447 U.S. 74 (1980). Pro-lifers who wished to peacefully protest believed that, based on the Pruneyard decision, they could gather in parking areas of abortion clinics to pray,

picket, pass out literature and speak to people about the evil of abortion. Certainly, they reasonably assumed, abortion clinics are commercial businesses and open to the public, thus their open areas (i.e., parking lots, lobbies, etc.) are areas where they could peacefully protest. What happened? The abortion clinics sued to remove the protestors and the courts held that multi-tenant office complexes housing abortion clinics were really not the same as multi-tenant shopping centers and, therefore, not open to the same extent for peaceful protest. However, the public sidewalk, the classic public forum, was an "alternative forum" open to pro-life Americans. So the pro-lifers moved to the public sidewalks to pray, picket, distribute literature and counsel women on alternatives to abortion. What happened? The abortion clinics sued arguing that the presence of pro-lifers on the sidewalk resulted in "harassment," "intimidation" and "interference" with their abortion operations. So California state courts issued "First Amendment Free Zones" precluding any pro-life speech or expressive conduct from occurring on public sidewalks in front of the abortion clinics. In some cases, the pro-lifers were restricted to protesting across the street. But don't worry said the pro-abortion plaintiffs, "alternative fora" exist. For example, you can go door to door to make your views known. You may distribute literature through the mail. You may contact residents by telephone. So pro-lifers began to march through neighborhoods, call residents, picket the neighborhoods where those who perform or assist abortions live. What happened? The pro-abortion plaintiffs sued. Injunctions were sought and obtained. And the beat goes on.

Even when pro-life Americans leave the protest arena and seek to offer alternatives they are hounded. For years pro-abortion advocates have challenged pro-lifers to "help women." So pro-life Americans establish crisis pregnancy centers where women could receive information that they will not receive from abortion clinics. THey will also receive money, shelter, and counseling as they carry their child to term. What happened? They were sued by

abortion clinics for allegedly deceiving women. As we speak, several crisis pregnancy centers are defending themselves from a lawsuit brought by abortion clinics. Freedom of choice -- no way. The only goal is absolute, unqualified abortion on demand with no criticism, no public opposition.

Everywhere in the country the rights of pro-life Americans to peacefully protest are under attack and the available areas for protest are being limited. I could tell you about one of my clients, a 65-year old women, suffering from M.S. and confined to a wheel-chair, who prayed the Rosary outside of an abortion clinic on the public walkway. This obviously dangerous protestor was sued because she allegedly harassed and intimidated abortion clinic staff, volunteer escorts, women and their companions. I believe she was sued because her presence and message were effective witnesses to the moral evil of abortion.

I could also tell you about Houston, Texas, where during the Republic Convention, a state court issued a 100 foot Free Zone in front of an abortion clinic. One of my clients, who was doing nothing more than simply walking down the street, toward the abortion clinic, still outside the 100 foot "Free Zone," was eventually stopped by a police officer and an attorney for the abortion clinic. The first words out of the police officer's mouth was the question, directed at my client: "Are you a born-again Christian?" Stunned that a governmental official would dare ask such a question, my client remained silent momentarily, trying to collect his thoughts. Before he could respond, a second question was posed, this time by the abortion clinic's attorney, who asked him: "Are you pro-choice?" This happened in August, 1992, in America! The clear indication was that if you didn't respond, respectively, "no" then "yes," you would not be allowed down the public sidewalk toward the clinic regardless of your conduct or motives. Discriminatory enforcement of injunctions occurs all the time -- and by such enforcement pro-life speech is being suppressed.

Let me give you one recent example. Ann Kelly is a resident of Billings, Montana. Mrs. Kelly is a 53 year old mother of five children. She is a devout Roman Catholic who believes that abortion is the killing of pre-born children. To communicate her pro-life views to all, Mrs. Kelly decided she would peacefully and quietly pray the Rosary as she walked up and down the public sidewalk in front of an abortion clinic located in Billings, Montana. And that is what she did - walking and praying, peacefully and quietly, up and down the public sidewalk.

Unfortunately for Mrs. Kelly, approximately nine months earlier, the abortion clinic had filed a lawsuit in a Montana state court seeking an injunction. Mrs. Kelly was not a named defendant in that lawsuit. The state court issued an injunction that, among other things, created a "corridor twenty-five feet wide" immediately in front of the abortion clinic.

Ann Kelly was arrested by two City of Billings police officers for praying the Rosary in front of the clinic. She was charged with criminal contempt for violating the "First Amendment Free Zone," even though she was not a defendant in the state court action and even though she was engaged in quiet and peaceful prayer on the public sidewalk.

When she was arrested Mrs. Kelly was alone on the sidewalk quietly praying her Rosary, which was clearly visible to passersby, the abortion clinic staff and the Billings police officers. At no time while she was praying was she talking to, or interfering with, any of the people entering or exiting the clinic or otherwise engaging in any disruptive conduct.

Despite the fact that Mrs. Kelly was only peacefully and quietly praying the Rosary, employees of the abortion clinic called the Billings Police Department and complained that Mrs. Kelly was praying the Rosary in front of the abortion clinic. As a result of this phone call, officers of the Billings Police Department arrested Mrs. Kelly.

Our office filed a civil rights action against the abortion clinic and police in federal court. A full day evidentiary hearing was held. The federal court decided to abstain because of the pending state criminal contempt charge against Mrs. Kelly.

The federal court, however, did issue eight pages of findings of fact. What did the federal court find after all the witnesses had testified?

1. That Mrs. Kelly was neither a named party to the underlying state court injunction action nor was she a member of Operation Rescue; nor had she engaged in any activities typically associated with Operation Rescue.

2. That Mrs. Kelly was not personally served a copy of the state court injunction, nor was the preliminary injunction read aloud to her by the abortion clinic staff or by an authorized law enforcement officer. That while Mrs. Kelly knew of the existence of the state court preliminary injunction she was unaware of the injunction's terms.

3. That at the time of her arrest, Mrs. Kelly was standing alone on the public sidewalk near the front of the abortion clinic, peacefully praying her rosary. That Mrs. Kelly had previously quietly and peacefully prayed the Rosary on that same public sidewalk and had not been arrested.

4. That on the morning of Mrs. Kelly's arrest, the decision to enforce the 25-foot First Amendment Free Zone originated with personnel from the abortion clinic. That the decision by the abortion clinic to enforce the injunction was based on "how clinic patients feel" about the pro-life demonstration and "the content of the speech" uttered by the pro-lifers.

5. That after an "extensive briefing" and "thorough day long testimonial evidentiary hearing" the federal court stated that it was still "very difficult" to determine when the abortion clinic and Billings Police Department would seek enforcement of the state court "preliminary" injunction. In light of the arguments made by counsel for the abortion clinic, the federal court suggested that the abortion clinic expected the Billings Police Department to

simply "administrate the power necessary to carry out the will of the" abortion clinic.

Furthermore, in open court, under oath, one witness for the abortion clinic conceded that it was the content of the pro-life message being expressed by Mrs. Kelly and others that was causing "distress" to women entering the clinic. Another representative of the abortion clinic admitted that had any person been carrying a so-called "pro-choice" sign within the 25-foot First Amendment Free Zone that the abortion clinic would not have called the police.

A Billings police officer testified that had someone been carrying a "Save the Whales" sign that he "most likely" would not have arrested that person.

Finally, and most tellingly, the executive director of the abortion clinic testified that if Mrs. Kelly had said to women as they entered the clinic "I'm pro-choice and I applaud your decision," that that message would not be "intimidating" to women. Conversely, had Mrs. Kelly stated "I believe abortion is an atrocity and [the] killing of unborn babies," the abortion clinic director stated that that message would constitute intimidation of women.

Fortunately for Mrs. Kelly, after the federal court issued its detailed findings of fact, the state criminal contempt charge was dismissed and the abortion clinic, reluctantly, agreed it would not seek to have her arrested for peacefully praying on the public sidewalk.

Mrs. Kelly was fortunate to have free local counsel; most pro-lifers do not have that luxury. Most pro-lifers, in that situation, would have had their constitutional rights suppressed.

Because S.636 contains broad, vague and undefined language, pro-abortion plaintiffs will undoubtedly use such language to suppress constitutionally protected expression and expressive conduct.

B. Peaceful, Protected Expression Would Be Suppressed or, at the Least Chilled

The phrases "physical obstruction," and "interfere" could easily be applied to reach peaceful, constitutionally protected expression and expressive conduct. A sidewalk counselor, for example, who momentarily steps in front of an individual entering or exiting an abortion clinic to hand out pro-life literature could easily be deemed to have physically obstructed such person or interfered with or attempted to interfere with that person receiving, or aiding, an abortion. Furthermore, a person peacefully carrying a picket sign while walking up and down a public sidewalk or walkway in front of an abortion clinic might cause a prospective abortion clinic client to momentarily slow down or to stop and step around such a picketer. Although the picketer was engaged in peaceful, expressive conduct protected by the First Amendment, the client who was momentarily blocked or required to take several extra steps to reach the abortion clinic could, consistent with the proposed language of S.636, charge that the picketer violated section 3.

Similarly, the term "intimidate" is so vague and standard-less that its potential to suppress or chill free speech is enormous. As I mentioned above, I have never been involved in a pro-life case where the abortion clinic, its staff and clientele have not charged pro-lifers with "intimidation." In almost one hundred percent of the cases, what the abortion plaintiff is really characterizing as intimidation is the pro-life speech being directed at them.

I understand that having someone express their opinion that what you are doing or about to do is a grave moral evil may very well prick your conscience, cause you to experience guilt, doubts, anguish, you may even feel intimidated, but it is intimidation born of moral persuasion and the power of speech, and such speech is absolutely protected. A pro-lifer's First Amendment right to express his or her views cannot be curtailed or limited because some persons are timid or reluctant to hear expressions of the pro-lifers's views on the issue of abortion even if the pro-lifers'

speech tends "to intimidate, harass or disturb patients or potential patients" of the abortion clinic. National Organization for Women v. Operation Rescue, 726 F.Supp 1438, 1497 (E.D.Va. 1989), aff'd., 914 F.2d 582 (4th Cir. 1990), reversed on other grounds, sub nom Bray v. Alexandria Women's Health Clinic, ___ U.S. ___, 122 L.Ed.2d 34 (1993).

The fact that all pro-life speech is intended to morally persuade and influence those involved with abortion not to abort unborn children and that many times those individuals feel "coerced" by the expressions of such pro-life speech does not remove the speech from the protective umbrella of the First Amendment. The Supreme Court decision in Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971) is instructive on this point.

In Keefe, protesters who objected to the sales tactics of a real estate broker distributed leaflets criticizing the broker's business practice. The leaflets were distributed at a local shopping center, at the broker's church and at the homes of some of the broker's neighbors. 402 U.S. at 416-17. The broker sought and obtained injunctive relief prohibiting the distribution of literature and picketing. The protesters appealed, but the appellate court affirmed, ruling that because the protesting activities were "coercive" and "intimidating" they were not protected by the First Amendment. The Supreme Court reversed by an 8-1 vote, holding that the protesters speech and leafletting were protected. The Court added:

> The claim that the expressions [of the protesters] were intended to exercise a coercive impact on [the broker] does not remove them from the reach of the First Amendment. [The protesters] plainly intended to influence [the brokers'] conduct by their activities; this is not fundamentally different from the function of a newspaper. [The protestors] were engaged openly and vigorously in making the public aware of [the brokers'] real estate practices. Those practices were offensive to [the protestors], as the views and practices of [the protestors] are no doubt offensive to others. But so long as the means are peaceful, the communication need not meet standards of acceptability.

Keefe, 402 U.S. at 419 (citation omitted; emphasis added).

Nor can pro-life speech be characterized as "intimidation" (and thereby trigger the severe penalties in S.636) because some individuals become angry or upset when their conduct or potential conduct is condemned in strong terms. In Terminiello v. Chicago, 337 U.S. 1, 4 (1949) the Supreme Court stated:

> Accordingly, a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction, with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudice and preconceptions and have profound unsettling effects as it presses for the acceptance of an idea.

(emphasis added).

Therefore, section 3's inclusion of the undefined terms "physical obstruction," "intimidate," and "interfere" pose a severe risk that peaceful, constitutionally protected pro-life expression and expressive conduct will be proscribed. At the very least, the draconian criminal and civil penalties set forth in sections 3(b) and (c) of S.636 will have a profound "chilling" effect on protected speech and expressive conduct. This "chilling" effect is inimical to fundamental First Amendment freedoms. See, e.g., NAACP v. Button, 371 U.S. 415, 432-33 (First Amendment freedoms "are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise as potently as the actual application of sanctions.") Very few pro-life Americans could afford to defend themselves from the criminal or civil action provided for in S.636 — even fewer could afford to pay the excessive and disproportionate penalties contained in the bill. Thus, the mere existence of these penalties would drive off many pro-life Americans from exercising their fundamental constitutional rights.

C. The Provisions of S.636 are Not Limited to the Entrances of Abortion Clinics

Section 3's provisions are, contrary to the bill's misleading title, not limited to the entrance areas of an abortion clinic. They are not expressly limited and so may fairly be said to apply

anywhere in the country. Indeed, S.636's undefined terms are so broad and vague that parents who, in their own home, momentarily stand in front of one of their minor daughters ("physically obstruct") to attempt to discuss with her an unexpected pregnancy and dissuade her from walking out the front door and obtaining an abortion ("interfere" or "intimidate") might very well be found to violate S.636. One might expect to find such legislation in the legal code of the former Soviet Union or present day China. That this provision could be enacted in America is frightening. And I have no doubt that, if enacted, parents will be sued for attempting to discourage their daughter from killing her unborn children.

D. The Rule of Construction Cannot Cure the Constitutional Defects

Finally, it is crucial to point out that section 3(f)(5) of S.636 cannot cure the constitutional defects set forth in the rest of section 3. Section 3(f)(5) sets forth a "rule of construction" that provides that "[n]othing in this section shall be construed or interpreted to prohibit expression protected by the First Amendment to the Constitution." This disclaimer is illusory - mere statutory window dressing. I have defended against injunction actions where a court issues an injunction that includes prohibitions that on their face preclude all conduct, lawful and unlawful. When I have objected to the apparent facially unconstitutional provisions, I have been directed by both the court and the pro-abortion plaintiff to language similar to 3(f)(5). I have never found, as a practical matter, that such language has ever protected the constitutional rights of my clients when the pro-abortion plaintiff seeks to enforce an express and specific term of the injunction.

Moreover, I do not believe that the Congress should pass legislation that is constitutionally overbroad and vague and seek to cure the defect with a "catch-all" disclaimer. Only legislation narrowly tailored to prohibit specific well defined unlawful conduct can pass constitutional muster. S.636 does not fit that description.

III. S.636'S BROAD ENFORCEMENT AND SUBSTANTIVE PROVISIONS APPLY ONLY TO PRO-LIFERS; SUCH VIEW-POINT DISCRIMINATION IS UNCONSTITUTIONAL

The provisions of S.636 only apply to those who act with a pro-life motive -- that is, they only apply to those who oppose abortion as a moral evil and, therefore, act with a pro-life motive. Thus, S.636 discriminates against pro-life motivation. It is axiomatic, however, that the Constitution forbids governmental prohibitions on the basis of an actor's point of view. Such view-point discrimination is blatantly unconstitutional. See, e.g., R.A.V. v. City of St. Paul, Minnesota, 120 L.Ed.2d 305 (1992).

For example, if a person "intentionally damages . . . the property of medical facility. . . because such facility provides abortion services," then that person is subject to the sanctions set forth in S.636. However, if a common thief or pro-abortion advocate or a member of an animal rights group of an employee of the clinic staff intentionally damages the property of an abortion clinic because: 1) the thief wants to steal; 2) the pro-abortion advocate is upset that the abortion clinic will not perform third trimester abortions; 3) the animal rights activist wants to draw attention to the plight of laboratory animals; or 4) the employee is involved in a labor dispute with the owner of the abortion clinic, then neither the thief, the advocate, the activist nor the employee will be subject to the provisions of S.636.

The Congress cannot, consistent with the First Amendment, proscribe conduct based on "hostility - or favoritism - towards the underlying message." R.A.V., 120 L.Ed.2d at 320. See also id. at 323 (The First Amendment does not permit government "to impose special prohibitions on those speakers who express views on disfavored subjects").

Finally, if S.636 is enacted it will set a dangerous precedent for all social movements that seek to change the status quo. If the pro-life movement can be the special object of oppressive legislation, then what is to prevent the government from similarly targeting those who protest the government's fiscal policy or

animal experimentation policy, etc. Indeed, under the Supreme Court's holding in cases such as R.A.V. v. City of St. Paul, 120 L.Ed.2d 305 (1992), any measures imposed against pro-lifers must also apply to other demonstrators.

IV. S.636 FAILS TO PROTECT PRO-LIFE DEMONSTRATORS FROM THE UNLAWFUL CONDUCT OF SOME PRO-ABORTION RADICALS

Not only does S.636 impermissibly discriminate against pro-lifers, it also fails to protect pro-life protestors from the unlawful conduct of some pro-abortion radicals and their supporters. Often, radical pro-abortion activists and sympathizers have physically prevented the pro-lifers from walking up and down a public sidewalk, sometimes with their bodies, sometimes with large signs usually depicting some form of sexual conduct (for example, two men engaged in sex). Sometimes, the pro-lifers have actually been hit by these signs or physically pushed away. Many times local police are present; rarely do they arrest the aggressor.

Additionally, if pro-lifers attempt to exercise their fundamental First Amendment rights to speak to women entering a clinic, pro-abortion advocates will scream in an attempt to drown out the pro-life message being conveyed. Other methods that are not uncommon are placing radios within inches of the ears of pro-lifers and turning the volume to the maximum level. Sometimes portable cassette tapes with obscene or vulgar words or phrases repeated over and over are placed next to the ears of pro-lifers (for example F _ _ _ you! F _ _ _ you! F _ _ _ you! over and over again).

Blasphemy is a common tactic used against pro-lifers. One of my clients, a Protestant pastor in Northern California, was told that "Your God rapes virgins," a blasphemous denigration of the Christian doctrine of the Virgin Birth. Another client, the 65 year old Catholic woman confined to a wheelchair, was told that she was "brain dead" as was "her Pope."

A related tactic used to disrupt constitutionally protected prayer is to mockingly "pray" along with the pro-lifer using

blasphemous and vulgar words, such as "Hail Mary, full of semen." One pro-lifer was asked if she masturbates as she prays the Rosary. The pro-abortion advocate then suggested ways the Rosary could be used in sexual acts.

Last summer in Baton Rouge, Louisiana, I witnessed several thousand pro-lifers at 3:00 a.m. praying, carrying candles and banners and singing hymns. They marched peacefully to an abortion clinic surrounded by a chain link fence that went down the middle of the road. Thirty to fifty police officers from the Baton Rouge police department were on hand. I did not see the pro-life demonstrators charge the abortion clinic or the police -- they simply presented a peaceful vigil against the act of abortion.

On the other side of a barricade erected by the police, radical pro-abortion activists screamed a litany of obscenities and blasphemies. Suddenly an older pro-life woman tripped and fell to the ground. A pastor from my home town reached down to assist the woman who had fallen. One of the radical pro-abortion activists reached his hands over the barricade and toward the pastor. The pro-abortion advocate screamed "Get your _____ hands off me or I'll spit on you and give you AIDS." This threat was issued even though the pastor was merely attempting to assist the woman who had tripped.

I have often asked police officers, whether they would rather deal with the average pro-lifer or the pro-abortion activists who "defend" abortion clinics. I have asked them who is polite and respectful and who is belligerent, vulgar and obscene.

The answer is almost always the same.

The police are <u>afraid</u> of the radical pro-abortion advocates. They may not agree with the pro-lifers but they are not afraid of them. In private, the police officers will tell you, that the pro-lifers, even those who engage in civil disobedience, are overwhelmingly polite and civilized in their behavior and speech. In contrast, the police officers I have spoken with will, without hesitation, tell you that they would rarely turn their backs on the radical pro-abortion advocates they arrest.

Finally, if pro-abortion advocates are not required to abide by the same rules as pro-life protestors, pro-abortion radicals will be granted a virtual license to harass pro-lifers. My clients explain it this way.

A state court has issued a broad injunction requiring, among other things, that pro-lifers not physically touch anyone connected with the abortion clinic. A pro-life protestor decides to peacefully pray, picket, etc. For several hours, the pro-lifer is the target of obscenities, blasphemies, physical touching; perhaps, his Bible is knocked out of his hands; his wife sexually propositioned, his daughter the witness to lewd conduct. After hours of this vile conduct and speech, the pro-lifer momentarily loses his cool and pushed the pro-abortion advocate out of his face, away from his wife, etc. Immediately, the pro-abortion advocate screams for the police, and often the pro-lifer is charged with contempt, arrested or both, while the pro-abortion advocate remains free to continue the harassment. As the Supreme Court has stated, government has no "authority to license one side of a debate to fight free-style, while requiring the other to follow Marquis of Queensbury Rules. R.A.V. v. City of St. Paul, 120 L.Ed.2d at 323.

V. S.636 IS UNNECESSARY; AMPLE STATE LEGAL REMEDIES ARE AVAILABLE FOR ANY PRO-LIFE MISSTEP

As illustrated by Mrs. Kelly's situation in Montana, abortion clinics have not hesitated to employ a broad array of existing state law, including state tort themes such as nuisance, trespass, assault, battery and false imprisonment. Pro-abortion advocates have also resorted to state constitutions in their battle against pro-lifers. Courts have responded by issuing broad injunctions; many times such injunctions include "First Amendment Free Zones" where all speech and expressive conduct are forbidden. Moreover, these courts have zealously enforced their injunctions against any and all individuals, whether or not they were parties to the litigation that produced the injunction. In my own experience, the

local police, the local prosecutor and local courts are willing, even eager to prosecute pro-lifers. Indeed, pro-life Americans face a double standard when defending themselves. In fact, it seems that the normal rules that apply to other social protest movements are discarded, in part or in whole, when the issue is abortion and the defendant is pro-life -- a phenomenon that one civil liberties attorney has labeled the "Abortion Distortion" factor. The Congress should not add to the "distortion" by passing this legislation. Finally, S.636 is unnecessary; its passage will be used not simply to protect the rights of abortion clinics but to suppress and chill the rights of pro-life citizens.

VI. CONCLUSION

If enacted, S.636 will be used in an attempt to crush the pro-life movement because the abortion industry despises the pro-life message and seeks to insulate itself from every form of criticism. Congress should not assist the abortion industry in this attempt at censorship. Thank you for your attention.

The CHAIRMAN. Thank you very much. I appreciate your presence here, and for members of the committee who have written questions, we'll submit those for your response in writing.

[Additional material follows:]

ADDITIONAL MATERIAL

STATEMENT OF THE AMERICAN CIVIL LIBERTIES UNION

On behalf of the American Civil Liberties Union (ACLU), I am pleased to submit this written statement for the hearing record on S. 636, the Freedom of Access to Clinic Entrances Act of 1993. The ACLU strongly endorses this legislation and submits this statement to clarify some of the first amendment issues that inevitably arise when clinic access bills are introduced.

The rising tide of violence and intimidation directed against abortion clinics, health providers and women seeking their services is a matter of grave concern to the ACLU. A woman's constitutional right to have an abortion is at stake.

The violence at issue in this debate is designed and intended to punish the exercise of a constitutional right, or to frighten people from exercising their rights in the first instance. These violent tactics unfortunately have been successful. A proper analogy is to the reign of terror during the 1960's directed against black citizens who exercised their right to vote and against those who assisted them.

It is important to dispel the notion, which some antiabortion activists and their supporters have advanced, that those, like the ACLU, who oppose this reign of terror somehow necessarily compromise the first amendment rights of antiabortion activists. That is not true. Moreover, as an organization preeminent in the protection of both the constitutional right to reproductive choice and free speech, we must exercise visible and vocal leadership in articulating the principles that protect both.

Antiabortion activists, like all citizens espousing any cause, are properly protected by the first amendment when they speak, march, demonstrate, pray or associate with others in expressive behavior. Such activities may be harsh, vigorous, unsettling, and unpleasant and still be protected by the first amendment, as our history amply demonstrates. But such activities may not physically obstruct others from exercising their rights, nor break the bounds of peaceful expression and assembly.

The murder of Dr. David Gunn earlier this year certainly sent a message, but it was not the sort of message that is protected by the first amendment. Nor does the wave of lesser violence that has long preceded the murder—and since intensified—merit constitutional protection. This violence has included anonymous death threats aimed at clinic owners and physicians, arson (a clinic in Montana was burned to the ground recently), drive-by shootings that have blown out clinic windows, the introduction of noxious chemicals into clinics through windows or keyholes, the pouring of hot tar on clinic equipment, and physical attacks on clinic staff and patients. All of these activities are criminal; none is even arguably protected by the first amendment.

The Constitution also does not protect activity that physically blocks or obstructs reasonable access to clinics. Longstanding first amendment law distinguishes between aggressive expression and behavior that obstructs others from exercising their rights. For example, one may set up a table on a sidewalk and offer literature, or position oneself in the middle of a sidewalk and distribute leaflets. However, a group of people may not link arms across the width of a sidewalk and obstruct people from passing. Local laws also prohibit demonstrators from blocking exits and entrances to a building. These sorts of distinctions are easily applicable to conduct outside of clinics, which may include both expression that is protected by the first amendment and behavior that is not. The physical obstruction of clinic entrances, for example, constitutes a tort and a crime, regardless of whether the blockaders sing, chant, pray, or otherwise express themselves during their blockade.

Moreover, although much speech that is properly protected by the first amendment may be perceived as harassment by unwilling listeners, not all harassment is protected. Terms like "harassment," "intimidation," and "invasion of privacy" are imprecise and susceptible of impermissible broad application that intrudes upon first amendment rights. But each of these terms also defines conduct that may properly be proscribed. Telephone calls or letters that threaten violence or seek to coerce people from exercising their rights are proscribable even though words are used. The use of words, even as an integral part of criminal behavior, does not always or automatically confer immunity; for example, extortion and blackmail are unprotected by the first amendment, although entirely based on oral or written expression.

Facts must be carefully evaluated in each instance. Much may depend on how threatening the communication is, how frequently it is repeated, where it is undertaken, at whom it is directed, and an array of other factors. For example, the first amendment may well protect demonstrators who shout "baby killer" at every woman entering a clinic, so long as the demonstrators neither block access nor disrupt ongoing medical procedures, regardless of the offensiveness of their words. On

the other hand, antiabortion activists properly may be chargeable with criminal harassment if they post themselves in front of a physician's house every morning and closely follow her children to school, intimidating them by shouting "Your mother kills babies." However difficult in individual cases, lines like these can and must be drawn.

Finally, special circumstances may justify special limitations. Rules that limit loudspeakers may be appropriate in some circumstances (outside a school or church, for example) but not in others (such as during a demonstration in front of City Hall). The use of bullhorns outside of medical facilities where operations are taking place or patients are recuperating has been properly and narrowly restricted. Such time, place, and manner restrictions must, however, be rigorously scrutinized to avoid unnecessary and overbroad restrictions.

Congress has a dual obligation to protect women exercising their constitutional right to choose and to the medical providers who assist them, as well as to protect the first amendment rights of antiabortion activists. Although there may be difficult judgments to make at the margins in particular circumstances, protecting the rights of women to have abortions and protecting the first amendment rights of people who oppose abortion are not necessarily incompatible.

During the 1960's civil rights struggles, no one ever suggested that shooting James Meredith or Viola Liuzzo was impossible to punish without violating the first amendment. No one ever suggested that Klan threats to would-be black voters or voter registration workers were somehow protected by the first amendment. What we face now is similar. Women choosing to exercise their constitutional right to reproductive choice, and medical providers who assist them, live with unrelenting violence, both actual and threatened. Without compromising anyone's first amendment rights or altering our traditional position on the first amendment in any way, the ACLU supports passage of Federal clinic access legislation that will create new causes of action against those who resort to illegal and violent means to prevent women from obtaining, and health-care practitioners from providing, the full range of reproductive health services, including abortions.

S. 636 fits squarely into the constitutional framework outlined above. Patterned after existing civil rights legislation, it provides urgently needed protection to abortion clinic patients and providers, while still permitting protestors peacefully to express their views as guaranteed by the first amendment.

We would like to bring to your attention, however, a clarification in the interpretation of the bill that should be added to the legislative history. This explanation involves the use of the words "threat of force" in the operative section of the bill. As discussed below in greater detail, the courts have made clear that the government may prosecute an individual for making this type of statement only when it is a true and meaningful threat, not a rhetorical one.

In perhaps the most relevant case in this area, the court in U.S. v. Gilbert, 884 F.2d 454 (9th Cir. 1989) cert. denied, 493 U.S. 1082 (1990), was presented with a charge that the defendant, a white supremacist, had violated the Fair Housing Act. That act, in language substantially similar to the language at issue here, criminally penalizes an individual who "by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate, or interfere with . . . any citizen because he is or has been, or in order to discourage such citizen or any other citizen from lawfully aiding or encouraging other persons to participate, without discrimination on account of race, color, religion, sex or national origin in any of the activities, services, organizations or facilities described [in this Act]." These activities include renting, financing, selling, or occupying a dwelling.

The court emphasized that in determining if a threat was a true threat, the finder of fact should look at the entire factual content and the surrounding events, as well as the reaction of the listeners. The court upheld the defendant's conviction since it concluded that the jury had found that the threat was a "true threat" as opposed to political hyperbole. 884 F.2d at 458. In an earlier opinion in the case, the court also made clear that "the statute's requirement of intent to intimidate serves to insulate the statute from unconstitutional application to protected speech." U.S. v. Gilbert, 813 F.2d 1523 (9th Cir. 1987).

The Gilbert court relied upon Watts v. United States, 394 U.S. 705 (1969) in analyzing the defendant's first amendment claim. In Watts, the Supreme Court considered a statute which in the Court's words "makes criminal a form of pure speech." Id. at 707. The defendant in Watts had been prosecuted under 18 U.S.C. §871(a) for threatening to take the life or inflict bodily harm upon the President. After participation in an antiwar rally, the defendant was overheard saying "if they ever make me carry a rifle, the first man I want to get in my sights is LBJ." After the statement was made, the crowd laughed.

The Court had no trouble concluding that the statute was constitutional on its face. But the Court warned,

> Nevertheless, a statute such as this one, which makes criminal a form of pure speech, must be interpreted with the commands of the first amendment clearly in mind. What is a threat must be distinguished from what is constitutionally protected speech.

Id. at 707. Thus the Court construed the statute "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide- open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." Id. at 708. The Court thereupon examined Watts' comment in context and noting the expressly conditional nature of the statement and the reaction of the listeners, the Court concluded that the statement was not a "true threat" but instead "political hyperbole."

After Watts, the issue in cases involving threats to the President became whether the conduct constituted a "true threat." The test was defined by one of the leading appellate cases to be whether the defendant made a statement,

> in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm upon or take the life of the President.

Roy v. United States, 416 F.2d 874, 877 (4th Cir. 1969); United States v. Hoffman, 806 F.2d 703 (7th Cir. 1986), cert. denied 481 U.S. 1005 (1987).

Courts have also consistently applied Watts in cases where threats were made against other individuals and first amendment defenses were raised. See U.S. v. Roberts, 915 F.2d 889 (4th Cir. 1990), cert. denied 111 S. Ct. 1079 (1991), (applying Watts to determine whether letter to Supreme Court Justice was a true threat in violation of 18 U.S.C. §115); United States v. Barclay, 452 F.2d 930 (8th Cir. 1971) (when letter to lawyer is analyzed according to principles of Watts, it is clear that communication is not a true threat). See also United States v. Kelner, 534 F.2d 1020 (2nd Cir.) cert. denied 429 U.S. 1022 (1976), (Court distinguished Watts in the course of upholding the conviction of a man who threatened to kill Yasser Arafat); U.S. v. Khorrami, 895 F.2d 1186 (7th Cir.), cert. denied 111 S. Ct. 522 (1990) (applying Watts to analyze whether mail and telephone calls to the Jewish National Fund constituted true threats, and finding that a reasonable jury could have concluded that the recipients of the mail and telephone calls would interpret them as a serious threat rather than as mere "political hyperbole.")

The Watts line of cases, as well as the court's reasoning in Gilbert, is consistent with the Supreme Court's admonition in NAACP v. Claiborne Hardware Co., 458 U.S. 886, in which the Court emphasized that:

> mere advocacy of the use of force or violence does not remove speech from the protection of the first amendment 'except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.' 458 U.S. at 927–28 (1982) (quoting Brandenberg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam)).

With this standard in mind, we ask that the legislative history of this bill make clear that following the Watts/Gilbert line of cases, only "true" or meaningful threats of force are subject to prosecution under this law, and that courts should construe the law in this manner. The legislative history should emphasize that, to prove the requisite intent to intimidate, it must be shown that the speaker "utter[ed] the words in an apparent determination to carry out the threat." U.S. v. Gilbert, supra at 457.

We commend you for introducing this critical legislation, which will provide women the access they need to reproductive health services, and at the same time will permit peaceful protests at clinics, in a manner consistent with the first amendment.

Statement of the American Medical Association

The American Medical Association (AMA) is pleased to take this opportunity to comment on S. 636, the "Freedom of Access to Clinic Entrances Act of 1993." We commend you for your sponsorship of legislation that would make it a criminal offense to use force or threat of force to intentionally injure, intimidate or interfere with one who is obtaining abortion services or lawfully aiding another in obtaining abortion services, or to intentionally damage or destroy a medical facility in which reproductive health services may be obtained.

Due to the growing violence against physicians and health care professionals generally, the AMA believes that S. 636 represents a critical step in permitting dedicated health care professionals to deliver lawful medical services without fear of harassment, threats or violence. We have called for an immediate investigation by the Department of Justice into groups and individuals known to target physicians, researchers and other health care providers and their places of business. Unless the issue of continued violence at health care facilities is directly confronted, the practice of medicine will be severely affected. Fewer physicians will work in emergency rooms, especially in inner cities with a higher incidence of crime. For example, a study at Nassau County Medical Center, New York revealed that 32 percent of physicians had been threatened by verbal abuse and gestures, while 12 percent were actual victims of battery. Physician flight from such areas will result in restricted access to medical care and could indeed limit the specific range of medical services offered. To this end, the provision in S. 636 directing the Secretary of Health and Human Services to conduct a study on the effect of the prohibited conduct on the delivery of reproductive health services for women, and upon medical facilities and providers will provide valuable information on this critical issue.

The AMA is very pleased with the definition of unlawful activities in S. 636, which is consistent with our own policy. In addition, we favor the establishment of federally defined safe zones for hospitals and clinics, research laboratories, academic health centers and other health facilities.

The AMA is pleased to support S. 636 and commends you for your efforts on behalf of health care professionals so that their ability to render care to patients without risk to personal freedom or safety will not be compromised.

Statement of Robert Abrams

I want to thank this distinguished committee for giving me the opportunity to submit this testimony on the Freedom of Access to Clinic Entrances Act of 1993, S. 636, and to offer my support for the speedy passage of a law that will protect women, physicians and other health personnel from violence aimed at family planning clinics and other health facilities that perform abortions. The Supreme Court's unfortunate decision in Bray v. Alexandria Women's Health Clinic[1] and the recent murder of Dr. David Gunn in Pensacola, FL, make ever more clear the urgent need for a federal law securing relief to women from those would who deprive them of access to reproductive health care.

For many years, I have urged the Federal Government actively to intervene into the national problem of violence against reproductive health clinics. In 1985, I wrote to then Assistant Attorney General William Bradford Reynolds, requesting that the Justice Department invoke its authority under 18 U.S.C. §241 to investigate and prosecute those responsible for a rash of bombings and other terroristic attacks on abortion clinics. Like many others, I was dismayed that the Justice Department at that time refused to exercise its considerable powers and resources to ensure safe passage to physicians at abortion clinics and the patients who use their services.

In 1991, together with Virginia's Attorney General, Mary Sue Terry, I submitted an amicus curiae brief to the Supreme Court in the Bray case, arguing that the Ku Klux Klan Act, 42 U.S.C. §1985(3), provides a Federal remedy against those who blockade and otherwise prevent access to reproductive health clinics. Again, the Justice Department sided with those who argued that the Ku Klux Klan Act does not provide relief from the conspiratorial activities of Operation Rescue and similar organizations.

Unfortunately, a majority of a sharply divided Supreme Court took a narrow view of the remedies Congress authorized when it enacted section 1985(3). On the record before the Court in Bray, the majority held that Operation Rescue's activities were not motivated by a "class-based animus," arguing that that organization's practice of blocking access to reproductive health care which only women need does not constitute sex-based discrimination. Accordingly, it held that the plaintiffs in that case had failed to state a claim for relief under the "deprivation clause" of 42 U.S.C. §1985(3). Congress must move swiftly to rectify that wrong-headed ruling.

There are at least two compelling reasons for enacting a national law providing redress to those who are injured by acts or threats of violence interfering with access to reproductive health care. First, experience demonstrates that, without access to the Federal courts and Federal law, and to the resources of the Federal Government, it is very difficult, if not impossible, to protect against planned campaigns intended to overwhelm local law enforcement. Second, the conspiracies to invade local

[1] 113 S. Ct. 753 (1993)

communities, such as those spearheaded by Operation Rescue, are truly national in scope and require a Federal response.

The efficacy of Federal jurisdiction was shown 2 years ago, in Wichita, KS, when thousands of Operation Rescue followers succeeded in preventing access to one of the few clinics in the Midwest that perform second trimester abortions. State and local officials, some sympathetic to Operation Rescue's aims, all but withdrew local law enforcement protection from the clinic and lawlessness prevailed. Private citizens, however, were able to seek relief from the Federal court under section 1985(3). When U.S. District Judge Kelly directed U.S. Marshals to enforce his injunction, order was restored to that city.

In April 1992, we narrowly averted a similar crisis in New York when Operation Rescue descended on Buffalo and surrounding communities. In fact, Mayor James Griffin of Buffalo had extended an opened arm invitation to Operation Rescue, promising that his police force would handle lawbreakers with kid gloves when they interfered with access to the clinics in that city. After my office threatened suit under 42 U.S.C. §1986, which enjoins public officials to take affirmative steps to protect against violations of section 1985, Mayor Griffin publicly pledged that the Buffalo Police Department would move appropriately against blockaders.

My office did sue Operation Rescue National and several of its leaders, including Randall Terry, and obtained a temporary restraining order protecting access to the clinics. That action, a companion case instituted by pro-choice activists, the heroic efforts of clinic defenders, the careful planning of local law enforcement officials, the cooperation of the U.S. Marshal and U.S. District Judge Richard Arcara's swift action to hold Operation Rescue leaders in criminal contempt combined to maintain order in Buffalo during a 2 week siege. No clinic was closed by a blockade for even a single minute.

Three months later, my office sued Operation Rescue National and Randall Terry and other members of his conspiracy to prevent blockades of clinics in New York City during the Democratic National Convention. Assisted by a temporary restraining order and a preliminary injunction issued by U.S. District Judge Robert J. Ward, the New York City Police Department and clinic defenders were able to prevent all but two short-lived clinic blockades that week. Less than a week after Operation Rescue members blockaded those clinics, my office commenced civil contempt proceedings before Judge Ward against seven organizational and individual contemnors. Within 2 weeks of the blockades, my office had conducted a 3 day trial. Those responsible for the blockades received stiff contempt sanctions. In all, $100,000 in civil penalties payable to the United States were levied against the blockaders.[2] Our efforts dealt Operation Rescue a major defeat in New York. But, without access to the Federal courts, the outcome may well have been different.[3]

The objective of Operation Rescue, its very modus operandi, is to overwhelm local law enforcement by flooding the streets and the courts with lawbreakers, and thereby prevent access to health care. The remarks to this Committee of David R. Lasso, former city attorney of Falls Church, VA, describing the events in his city that gave

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[2] In his preliminary injunction, Judge Ward also enjoined Randall Terry and other defendants not to present or confront then Governor Bill Clinton and Senator Albert Gore with a fetus or fetal remains, acts which Terry and his cohorts had been threatening for weeks. When Terry and other Operation Rescue members violated that order, and the U.S. Attorney for the Southern District of New York declined the district court's request that it prosecute Mr. Terry for criminal contempt, Judge Ward appointed my office to prosecute the criminal action on behalf of the United States. Randall Terry was convicted of criminal contempt under 18 U.S.C. §401(3) on March 5, 1993. United States v. Randall Terry, 815 F. Supp. 728 (S.D.N.Y. 1993). He will be sentenced on June 11, 1993 and can be imprisoned for up to 6 months.

[3] Both Bray and recent rulings by lower Federal courts suggest that there may be a continued role for §1985(3) in efforts to redress clinic blockades. In Town of West Hartford v. Operations Rescue, 1993 WL 127175 (2d Cir., April 21, 1993), a unanimous Court of Appeals declined to dismiss an action brought under the "deprivation clause" of §1985(3), holding that the Bray Court's finding that there was no class-based animus in that case was limited to the record before it. The Court of Appeals remanded the matter to the trial court for further factual findings on whether the Hartford defendants are motivated by a class-based animus and intended to deprive women of constitutionally secured rights.

In addition, the Bray majority expressly declined to consider whether a claim was stated under the "preventing or hindering clause" of §1985(3). Bray, 113 S. Ct. at 765. Four justices, however, concluded that a valid claim was stated under the preventing and hindering clause. See id., at 770–79 (Souter, J., concurring in part and dissenting in part); 795–98 (Stevens and Blackmun, JJ., dissenting); 804–05 (O'Connor and Blackmun, JJ., dissenting). At least one district court has since held that an allegation under the preventing or hindering clause would support Federal jurisdiction. See United States v. Terry, 815 F. Supp. at ——n. 4.

Nevertheless, passage of legislation like FACES is essential to ending unnecessary legal wrangling over the jurisdiction of the Federal courts. It would also create much needed Federal criminal penalties for conduct obstructing access to reproductive health care.

rise to the Bray litigation depict only one instance when antichoice demonstrators have obstructed access to legal health care by overwhelming local police forces. The campaign has been repeated scores of times in towns and cities from coast to coast.

Indeed, Randall Terry, Operation Rescue's founder, in his writings about that organization's operating guidelines, has made no effort to hide his view that when the law conflicts with his values, "the law must give way." R. Terry, Operation Rescue, 124–25 (1988). He has exhorted his followers to disregard lawful court orders and embarrass the judiciary:

> The pro-aborts are completely misusing the justice system. . . . Judges need to know they should not capitulate. They also need to know very clearly that we will not be intimidated. . . . If a judge bows to the pressure of pro-abortion forces, he must know (that) . . . [t]hese cases will take up precious time on an already overcrowded docket. . . . He will look foolish to the public for issuing an order because rescuers won't obey.[4]

He encourages mass disregard for the law so that judicial resources become overtaxed and fail. See, e.g., R. Terry, To Rescue the Children 49 (1986) ("You should check how overloaded the city's jail and court systems are. In many, many cities, the courts and jails are too overloaded to deal with rescue missions.") It is therefore critical that private citizens and State and local officials be able to call upon the Federal courts to enforce Federal law that protects against lawless interference with access to medical care.

The national scope of clinic blockade activities is demonstrated by the geographical diversity of the witnesses who have appeared before this committee. Witnesses from Providence, RI, Missoula, MT, and Falls Church, VA have recounted the violence visited upon their facilities and communities by those who oppose the right to choose. The lawbooks, too, are filled with case after case of litigation aimed at preventing clinic blockades.[5]

In New York's litigation, which encompassed its two largest cities at opposite ends of the State, Operation Rescue leaders from Georgia, California, Virginia and elsewhere were sued for organizing the attempted blockades. One of the defendants, Joseph Foreman, flew in from Milwaukee, where his organization, Missionaries to the Pre-born, was leading children en masse to blockade clinics and subject themselves to arrest. He used his three or so days in New York City to participate in the contumacious presentation of a fetus to President Clinton. Another defendant, a South Carolina resident, was organizing blockades in Baton Rouge, LA while the activities in New York City were underway. Several weeks after the Federal court in New York City directed U.S. Marshals to arrest five contemnors in our litigation, two of them, Randall Terry, a New Yorker, and Patrick Mahoney, a Virginia resident, were held on charges of contempt of court for blockades in Houston, TX. And when the criminal contempt trial of Randall Terry was about to begin, one of his witnesses, a leader of Operation Rescue—California, had to be transported by Federal marshals to Manhattan from jail in western New York, where he was incarcerated for criminal contempt of the Buffalo district court's injunction.[6]

S. 636 would rectify the noxious Bray decision and take an important step toward securing clinic access against the lawless conspiracy of Operation Rescue and others. I am particularly encouraged that the bill does not limit its focus to blockades at

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[4] R. Terry, Letter in Operation Rescue Pamphlet quoted in Note, "Judicial Ineffectiveness: The Inability to Curtail Unlawful Right to Life Protest Activity," 35 N.Y.L.S. Rev. 447, 450 n.55 (1990). See also R. Terry, Letter of April 2, 1990 ("If a judge sentences rescuers to . . . jail, and catches flak from the community, it will cause him to think twice about his injustice and he will probably back off. . . . If he doesn't respond, then work to get him recused from cases, or removed from office. Give him no rest.")

[5] E.g.,Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753 (1993) (Virginia); Town of West Hartford v. Operation Rescue, 1993 WL 127175 (2d Cir., April 21, 1993) (Connecticut); New York State N.O.W. v. Terry, 886 F. 2d 1339(2d Cir. 1989), cert. denied, 495 U.S. 948 (1990) (New York City); Lucero v. Operation Rescue of Birmingham, 954 F.2d 624 (11th Cir. 1992) (Alabama) ; Volunteer Medical Clinic, Inc. v. Operation Rescue, 948 F. 2d 218 (6th Cir. 1991) (Ohio); Northeast Women's Center, Inc. v. McMonagle, 868 F.2d 1342 (3d Cir.), cert. denied, 110 S. Ct. 261 (1989) (Pennsylvania); Portland Feminist Women's Medical Center v. Advocates for Life, Inc., 859 F. 2d 681 (9th Cir. 1988) (Oregon); Pro-Choice Network v. Project Rescue, 799 F. Supp. 1417 (W.D.N.Y. 1992) (Buffalo, N.Y.); Town of Brookline v. Operation Rescue, 762 F. Supp. 1521 (D. Mass. 1991) (Massachusetts); Southwestern Medical Clinics of Nevada v. Operation Rescue, 744 F. Supp. 230 (D. Nev. 1989) (Nevada); NOW v. Operation Rescue, 726 F. Supp. 300 (D.D.C. 1989) (District of Columbia); National Abortion Federation v. Operation Rescue, 721 F. Supp. 1168 (C.D. Cal. 1989) (California); Berina v. Share, 721 P. 2d 918 (Wash. 1986) (Washington).

[6] See In re Slovenec, 799 F. Supp. 1441 (W.D.N.Y. 1992) and United States v. Terry, 806 F. Supp. 490 (S.D.N.Y. 1992) for references to Jeff White.

clinic entrances but also addresses intimidation of and violent interference with women and providers that occur away from clinics. Proposed 42 U.S.C. §2715 would subject to criminal and civil penalties whoever:

> by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other class of persons, from——
>
> (A) obtaining abortion services; or
>
> (B) lawfully aiding another person to obtain abortion services. . . .

As Attorney General of New York, I have received reports from physicians about harassment and threats of violence against them, their colleagues and their families, and I am deeply troubled by them. Harassment of providers occurs at their residences, places of worship, schools, and other places in the communities where they and their families may be found. Such harassment occurs throughout the State, but is a particular problem in rural areas, where reproductive health services are scarce. The horrifying slaying of Dr. Gunn during organized antichoice demonstrations directed at him—and the few and unconvincing statements of remorse by antichoice leaders that followed—increase my apprehension for the safety of this country's reproductive health providers. I have therefore urged the House of Representatives to consider adding protection to the clinic access legislation pending before that body that is as broad in reach as S. 636.

I am confident that proposed section 2715 comports with the important values embedded in the first amendment. In seeking to secure the ability of women to exercise their reproductive freedom, we must, of course, ensure that the rights to speak and to petition government, which are so fundamental to our constitutional democracy, are not infringed. In prohibiting conduct, not speech, S. 636 scrupulously respects those vital rights. Moreover, it is well-settled that the first amendment does not protect conduct that amounts to harassment or unwarranted intrusions upon the privacy of the home. The Supreme Court and State courts have repeatedly upheld laws and injunctions prohibiting "targeted picketing" at residences.[7] Many States have enacted "antistalking" laws[8]; certainly Congress can enact like measures under the broad powers of section 5 of the fourteenth amendment.

I believe that in one respect S. 636 can be improved. I urge the Senate to add a provision expressly authorizing State attorneys general to bring civil enforcement actions under it. I do not doubt that, in its present form, my office and the offices of other State attorneys general could invoke the States' authority as parens patriae[9] and sue as "persons aggrieved" under proposed 42 U.S.C. §2715(e)(1)(A). Judge Arcara held in People of the State of New York v. Operation Rescue National, et al., 92–CV–0147A, slip. op (W.D.N.Y. April 17, 1992), a copy of which is annexed, that the State of New York could exercise its parens patriae authority in a suit under section 1985(3). Judge Ward has reached a similar conclusion. United States v. Terry, 806 F. Supp. 490, 494 (S.D.N.Y. 1992) (In bringing People of the State of New York v. Operation Rescue National. et al., 92 Civ. 4884 (S.D.N.Y.), "[r]ather than representing the interests of a private party, the Attorney General acts as parens patriae, asserting a 'quasi-sovereign interest' for the common good of the people of the State of New York.")

Nevertheless, I urge the committee and Congress as a whole expressly to list State attorneys general as parties who may bring suit under the Freedom of Access

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[7] Frisby v. Schultz, 487 U.S. 479 (1988); Boffard v. Barnes, 591 A.2d 699 (N.J. Super. Ch. 1991); Valenzuela v. Aquino, 800 S.W.2d 301 (Tex. App.—Corpus Christi 1990); Town of Barrington v. Blake, 568 A.2d 1015 (R.I. 1990); Klebanoff v. McMonagle, 552 A.2d 677 (Pa. Super. 1988).

[8] See, e.g., N.Y. Penal Law §240.25.

[9] The Supreme Court has long recognized the propriety of States suing as parens patriae to redress injuries to the health and welfare of their inhabitants, and has permitted such suits for relief from wide-spread discrimination. See Alfred L. Snapp & Sons. Inc. v. Puerto Rico, 458 U.S. 592 (1982). My office often invokes the State's parens patriae standing to sue in Federal court to remedy patterns and practices of discrimination. E.g., People by Abrams v. 11 Cornwell Co., 695 F.2d 34 (2d Cir. 1982), modified on other grounds, 718 F.2d 22 (2d Cir. 1983) (en banc); Support Ministries v. Village of Waterford, 799 F. Supp. 272 (N.D.N.Y. 1992); People of the State of New York v. Merlino. et al., 88 Civ. 3133 (S.D.N.Y. August 18, 1990); People of the State of New York v. The Ocean Club, 82 Civ. 0790 (E.D.N.Y. Jan. 24, 1984); People of the State of New York v. Data Butterfield, 80 Civ. 0365 (E.D.N.Y. June 27, 1980). See also Commonwealth of Pennsylvania v. Porter, 659 F. 2d 306 (3d Cir. 1981), cert. denied, 458 U.S. 1121 (1982); Commonwealth of Puerto Rico ex rel. Ouiros v. Brankamp, 654 F. 2d 212 (2d Cir. 1981), cert. denied, 458 U.S. 1121 (1982); Commonwealth of Pennsylvania v. Flaherty, 404 F. Supp. 1022 (W.D. Pa. 1975); Commonwealth of Pennsylvania v. Glickman, 370 F. Supp. 724 (W.D. Pa. 1974).

Act, just as the U.S. Attorney General would expressly be authorized to bring suit.[10] An express authorization will ensure that my office and those of other attorneys general will avoid needless jurisdictional disputes in the lawsuits that are certain to be brought once the law is enacted. In that way, we can obtain swifter and more certain relief from the continuing lawlessness that Operation Rescue and its adherents promise.

In that regard, I bring to your attention a resolution endorsed by the National Association of Attorneys General in its 1993 Spring meeting in Washington last month. Taking note of the Bray decision and the House of Representatives' consideration of H.R. 796, NAAG resolved to "[u]rge[] Congress to adopt appropriate legislation to protect women, physicians and other health personnel from violence aimed at family planning clinics across the country where abortions are performed" and called upon Congress to authorize State attorneys general to sue to enforce the terms of such legislation. A copy of the resolution is annexed.

S. 636 and the bill now before the House are vital responses to a Supreme Court decision that must be rectified. I urge Congress to move as swiftly as possible to enact legislation securing access to reproductive health services against violent obstruction, so that a woman's fundamental constitutional right to choose does not become illusory.

[10] There is ample precedent for express statutory authorization enabling State attorneys general affirmatively to invoke Federal law in Federal court. See 15 U.S.C. §15c (authorizing State attorneys general to sue to enforce Clayton Antitrust Act).

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK,
by ROBERT ABRAMS, Attorney General of
the State of New York,

Plaintiff,

v.

OPERATION RESCUE NATIONAL, et al.,

Defendants.

DECISION AND ORDER
92-CV-0147A

DECISION
AND
ORDER

RICHARD J. ARCARA
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK, by ROBERT ABRAMS, Attorney General of the State of New York,

Plaintiffs,

v.

OPERATION RESCUE NATIONAL, ET AL.,

Defendants.

DECISION AND ORDER
Civ-92-147A

INTRODUCTION

Currently before the Court are the following motions: (1) defendants' motion to dismiss the action, pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6)[1]; (2) plaintiffs' motion to consolidate this action with Pro-Choice Network, et al. v. Project Rescue Western New York, et al., Civ-90-1004A ("Pro-Choice Network"), pursuant to Fed. R. Civ. P. 42(a); and (3) plaintiffs' motion for a preliminary injunction, pursuant to Fed. R. Civ. P. 65. Oral argument on the motions was heard on April 10 and April 15, 1992.

Defendants Operation Rescue National, Keith Tucci, Randall Terry, Rev. Paul Schenck and Rev. Robert Schenck are represented in this action by James M. Henderson, Sr., Esq. and John Stepanovich, Esq. Defendants Christian Activist Lifeline, Hetty Pasco, Johnny

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[1] The motion to dismiss was originally brought on behalf of defendants Operation Rescue National, Keith Tucci, Randall Terry, Rev. Paul Schenck and Rev. Robert Schenck only. However, at oral argument, the Court granted the oral request of defendants Christian Activist Lifeline, Hetty Pasco, Johnny Hunter, Karen Swallow Prior and Nancy Walker to join in the motion to dismiss.

Hunter, Karen Swallow Prior and Nancy Walker are represented in this action by William J. Ostrowski, Esq. Defendants Pro-Life Rescue Movement of Western New York and Friends to the Weary did not appear at oral argument and have not filed either an answer or a motion.

After reviewing the submissions of the parties and hearing argument from counsel, the Court: (1) finds that the State of New York has standing in this case under the doctrine of parens patriae; (2) reserves decision on the remainder of defendants' motion to dismiss; (3) reserves decision on plaintiffs' motion to consolidate; and (4) reserves decision on plaintiffs' motion for a preliminary injunction until after an evidentiary hearing.

DISCUSSION

I. Motion to Dismiss

The Attorney General of the State of New York, Robert Abrams, has commenced this action on behalf of the People of the State of New York and seeks to enjoin defendants from blockading any facility where abortions are performed, abusing or intimidating patients or staff of such facilities and harassing physicians who perform abortions. Defendants consist of eight individuals and four organizations who are opposed to abortion and dedicated to the "pro-life" movement.

Defendants contend that this action should be dismissed because the State lacks standing. The State, however, contends that it has standing under the doctrine of parens patriae. The

Court agrees with the State.

The Second Circuit has affirmed that the State of New York as parens patriae has standing to redress civil rights violations directed against its citizens by bringing suit under 42 U.S.C. § 1985(3). People of the State of New York by Robert Abrams v. Eleven Cornwell Co., 695 F.2d 34 (2d Cir. 1982), modified on other grounds, 718 F.2d 22 (2d Cir. 1983) (en banc). In Cornwell, the court recognized that a state is entitled to parens patriae standing if: (1) it has alleged injury to a "quasi-sovereign" interest; (2) it has alleged injury to a sufficiently substantial segment of its population; and (3) individuals cannot obtain complete relief through a private suit. Id. at 38-40. Applying this standard, the Court finds that the State of New York has parens patriae standing in this case.

To maintain a parens patriae action, the State must allege an injury to a "quasi-sovereign" interest. Id. at 38; see also Commonwealth of Puerto Rico ex rel. Quiros v. Brankamp, 654 F.2d 212, 215 (2d Cir. 1981), cert. denied, 458 U.S. 1121 (1982). The Supreme Court has held that "a State has a quasi-sovereign interest in the health and well-being--both physical and economic--of its residents in general." Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 607 (1982). In this case, the State asserts two forms of a "quasi-sovereign" interest in the health and well-being of its citizens: (1) an interest in protecting women from serious risks to their health; and (2) an interest in protecting women from invidious discrimination.

The conspiracy to prevent women from obtaining access to reproductive health services alleged against defendants in this case is similar to the conspiracy alleged against defendants in the Pro-Choice Network case. In Pro-Choice Network, the Court found that such a conspiracy endangers the physical health and welfare of women in the Western District of New York. See Pro-Choice Network Decision and Order dated February 14, 1992, at 20; see also New York State NOW v. Terry, 886 F.2d 1339, 1362 (2d Cir. 1989), cert. denied, 495 U.S. 947 (1990). Thus, in this case, the State has a "quasi-sovereign" interest in protecting women from the serious health risks that could result from the type of conduct alleged against defendants.

In addition to its "quasi-sovereign" interest in protecting women from serious health risks, the State has a "quasi-sovereign" interest in protecting women from invidious discrimination. In the Snapp case, the Commonwealth of Puerto Rico filed suit against individuals and companies engaged in the apple industry alleging that they discriminated against Puerto Rican migrant workers based on their ethnicity. The district court dismissed the complaint, holding that Puerto Rico lacked standing. The Court of Appeals found that Puerto Rico had standing under the doctrine of parens patriae and reversed the lower court.

The Supreme Court, in affirming the Court of Appeals, held that Puerto Rico had standing under the doctrine of parens patriae. The Court found that Puerto Rico had a "quasi-sovereign" interest in protecting its citizens from invidious discrimination. Snapp,

458 U.S. at 609. It stated that: "This Court has had too much experience with the political, social, and moral damage of discrimination not to recognize that a State has a substantial interest in assuring its residents that it will act to protect them from these evils." Id. Following the Supreme Court, the Second Circuit has held that the State of New York has a "quasi-sovereign" interest from protecting its residents from the harmful effects of discrimination. Cornwell, 695 F.2d at 38-39.

In this case, the State alleges that defendants are motivated by a class-based invidious discriminatory animus against women seeking abortions. The State also alleges that defendants have conspired to deprive women of their civil rights, including their constitutional right to travel and their right to have an abortion. Both this Court and the Second Circuit have held that such a conspiracy violates § 1985(3). See Pro-Choice Network Decision and Order dated February 14, 1992, at 23, 26, 28; Terry, 886 F.2d at 1359-61. Thus, the State has a "quasi-sovereign" interest in protecting women from invidious discrimination and securing for them their constitutional rights.

The Court also finds that defendants' alleged discriminatory conduct inflicts injury on a substantial portion of the population. In determining whether parens patriae standing is appropriate, courts have declined to set "definitive limits on the proportion of the population of the State that must be adversely effected by the challenged behavior". Snapp, 458 U.S. at 607. As the Court of Appeals observed in Snapp:

> There has never been cast a hard and fast game of numbers. Parens patriae standing is appropriate where a sovereign seeks to protect a vital aspect of the general welfare of a substantial portion of its citizenry from serious, harmful, offensive conduct. It is the magnitude and the pervasiveness of the societal harm that must be weighed -- not the directness of the injury to particular individuals.

Commonwealth of Puerto Rico v. Alfred L. Snapp & Sons, Inc., 632 F.2d 365, 370 (4th Cir. 1980), aff'd, 458 U.S. 592 (1982). The Second Circuit has held that when considering whether a State has alleged injury to a sufficiently substantial segment of its population, a court must "consider 'indirect effects of the injury' as well as direct ones. . . ." Cornwell, 695 F.2d at 39 (quoting Snapp, 458 U.S. at 607).

In this case, the State alleges that defendants plan to force area abortion providers to cease operation. Such conduct will clearly injure numerous women who wish to exercise their constitutional right to choose to have an abortion. That harm, in itself, is sufficiently substantial to warrant the State's involvement. But the magnitude and persuasiveness of defendants' alleged conduct goes well beyond the individual women or individual health care providers who will be directly injured by their conspiracy in this district. Defendants' alleged conduct could harm numerous other women who choose to have abortions in New York by encouraging others to "blockade" or otherwise obstruct access to abortion clinics throughout the State. Defendants' alleged conspiracy thus threatens to harm the health and well-being of a substantial number of women throughout New York.

Finally, the third prong of the parens patriae test, whether individuals can obtain complete relief through a private suit, presents a closer question in this case. Defendants argue that the State cannot satisfy the third prong because the private plaintiffs in the Pro-Choice Network case can, and already have, obtained complete relief. The State's parens patriae standing, however, is not diminished merely because private plaintiffs have commenced litigation seeking related relief.

The Second Circuit has held that "a state seeking to proceed as parens patriae need not demonstrate the inability of private persons to obtain relief if parens patriae standing is otherwise indicated." Brankamp, 654 F.2d at 217 (citations omitted). In Brankamp, ethnic Puerto Ricans were denied employment by New York apple growers and, as in Snapp, both the Commonwealth of Puerto Rico and the individual workers brought suit. Id. The court held that the interests of individual workers, who were concerned with their own injuries, were not coextensive with the interests of the general populace, which only the Commonwealth could represent. Id. There was no assurance, for example, that the workers would hold all discriminators accountable, that they would actively pursue relief against widespread and future discrimination, or that they could bear the costs of a lawsuit that would obtain complete relief. The Court stated that "[t]he vindication of the rights of all future migrant laborers in the public of Puerto Rico should not be made dependent upon the possible relief obtained by the individual workers". Id.

Indeed, in almost every parens patriae action, remedies for private parties are available and are frequently sought. For example, in both Snapp and Bramkamp, individual workers had brought their own actions. To argue that the availability of private remedies forecloses the State from suing to enjoin harm to the health and well-being of its citizens would contradict Snapp's holding that the State has a "quasi-sovereign" interest in protecting its citizens from those harms.

Women throughout the State of New York should be able to rely upon the Attorney General, acting as parens patriae, to secure for them their rights under the law and should not have to depend upon the actions and potentially limited resources of private parties. There is no assurance that the private litigants in the Pro Choice Network case will have adequate resources for, or an interest in, vindicating the rights of all persons who could be injured by defendants' alleged conduct. Thus, the State has standing to litigate this action as parens patriae on behalf of the People of the State of New York.

With regard to the remainder of defendants' motion to dismiss, the Court will reserve decision until after an evidentiary hearing on plaintiffs' motion for a preliminary injunction.

II. Motion to Consolidate

Plaintiffs have moved to consolidate this action with the Pro-Choice Network action, pursuant to Fed. R. Civ. P. 42(a). The Court will reserve decision on this motion.

III. Plaintiffs' Motion for a Preliminary Injunction

Plaintiffs have moved for preliminary injunction, pursuant to Fed. R. Civ. P. 65. In support of its motion, plaintiffs have submitted the affidavit of Robert R. Reed, Esq., Assistant Attorney General for the State of New York, along with several exhibits consisting of various newspaper articles, literature allegedly distributed by defendants and a transcript of a television program. Mr. Reed, in his affidavit, asserts that it is the declared intention of the defendants to conduct massive "blockades" at facilities where abortions are performed in the Western District of New York during the period April 20, 1992 to May 4, 1992. These activities have been referred to in the literature allegedly distributed by defendants as the "Spring of Life."

The Court finds that the evidence submitted in support of the preliminary injunction is insufficient to warrant such an injunction at this time and that an evidentiary hearing is required. See Fireman's Fund Ins. Co. v. Leslie & Elliot Co., 867 F.2d 150 (2d Cir. 1989). The Court will schedule such a hearing at its earliest convenient date. This delay should not unduly prejudice plaintiffs because there is already a preliminary injunction in place in the Pro-Choice Network case which provides almost all of the same relief that plaintiffs here seek.

If, during the interim, plaintiffs determine that there is a need for some sort of immediate relief, they may make a written application for a temporary restraining order, pursuant to Fed. R. Civ. P. 65, or may move to intervene in the Pro-Choice Network

case, pursuant to Fed. R. Civ. P. 24(b).

CONCLUSION

For the reasons stated, the Court: (1) finds that the State of New York has standing in this case under the doctrine of parens patriae; (2) reserves decision on the remainder of defendants' motion to dismiss; (3) reserves decision on plaintiffs' motion to consolidate; and (4) reserves decision on plaintiffs' motion for a preliminary injunction until after an evidentiary hearing.

It is so ordered.

Richard J. Arcara

HONORABLE RICHARD J. ARCARA
UNITED STATES DISTRICT JUDGE

Dated: April 17, 1992

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

Adopted

Spring Meeting
March 28-30, 1993
Washington, D.C.

RESOLUTION

TO SUPPORT LEGISLATION TO PROTECT PATIENTS AND HEALTH CARE PERSONNEL AT FAMILY PLANNING CLINICS

WHEREAS, as chief legal officers for our respective states, we take pride in our diverse communities, their historic respect for life and property, and the American tradition of open and peaceful discussion of issues of public policy; and

WHEREAS, we strongly support every citizen's constitutional freedom of speech, which includes peaceful, legal public witness, assembly and picketing; and

WHEREAS, we recognize that many citizens of the country hold deep convictions regarding the abortion issue; and

WHEREAS, bombing, arson, murder and any other acts of criminal violence are clearly not appropriate means of addressing issues of public policy in the United States; and

WHEREAS, the recent murder of Dr. Gunn outside his clinic in Florida is the latest example of violence against family planning clinics; and

WHEREAS, since 1980 in the United States, over 400 bombings, arsons and acts of vandalism have been directed against family planning clinics; and

WHEREAS, the recent United States Supreme Court ruling in Bray vs. Alexandria, holding that federal courts have no jurisdiction under existing civil rights laws to act to protect patients and employees of family planning facilities, made clear the need for Congress to act; and

WHEREAS, the Congress is considering legislation such as H.R. 796, The Freedom of Access to Clinic Entrances Act of 1993, which would, among other things;

1. Make assaults and attacks on medical personnel and property at family planning facilities a federal criminal offense and make clear the federal law enforcements' power to act.

2. Establishes a private right of action for parties injured by such criminal conduct.

3. Authorizes the United States Attorney General to bring civil suits to obtain injunctions against offensive conduct, seek damages for the victims, and impose stiff fines on the perpetrators; and

WHEREAS, many individuals including United States Attorney General Janet Reno have already spoken out forcefully in support of this sensible legislation;

NOW, THEREFORE, BE IT RESOLVED THAT THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL:

1. While not taking a public position on the abortion issue, condemns any and all acts of criminal violence directed against family planning clinics; and

2. Urges Congress to adopt legislation designed to protect women, physicians and other health personnel from violence aimed at family planning clinics across the country where abortions are performed, without unduly infringing on the right to peaceful protest; and

3. Commends those who pursue peaceful, legal discussion of the abortion issue and appeals to all citizens concerned about the abortion issue to conduct all public discussions in a peaceful and legal manner; and

4. Urges Congress to expressly authorize state Attorneys General to enforce in the federal courts in their states the provisions of any federal law aimed at violence at family planning facilities; and

5. Authorizes its Executive Director and General Counsel to transmit these views to appropriate members of the Administration, Congress, and other interested individuals and associations.

THE RELIGIOUS COALITION FOR ABORTION RIGHTS

The Religious Coalition for Abortion Rights is pleased to submit testimony to the Senate Labor and Human Resources Committee regarding S. 636. We believe, if enacted, this legislation will protect and promote the public health and safety by prohibiting the use of force, threat of force or physical obstruction to injure, intimidate or interfere with a person seeking to obtain or provide abortion services, and the destruction of property of facilities providing abortion services, and by establishing the right of private parties injured by such conduct, as well as the Attorney General in appropriate cases, to bring actions for appropriate relief. We urge this Committee to amend Title XXVII of the Public Health Service Act to include this pending legislation.

Abortion foes across our Nation and in our Nation's capitol harass and intimidate women seeking abortion at medical facilities. They blockade the clinics of the doctors who provide abortion care. They commit these and other acts of violence in the name of religion.

RCAR deplores the intimidation, harassment, stalking, terrorism,—and even murder—that surrounds women who choose abortion and the medical professionals who serve them. The tragic and senseless shooting death of Dr. David Gunn on March 11, 1993, in Pensacola, Florida was an inevitable outgrowth of this society's failure to say no to violence at women's clinics. The religious intolerance expressed by anti-abortion protesters here and at medical facilities throughout the country has—inevitably—bred this violence, and it must stop.

Contrary to common perception, religious doctrine does not speak with a single voice nor declare a single stand on the abortion issue. Each of the 36 national mainline Protestant, Jewish and other faith groups who comprise the Religious Coalition for Abortion Rights approaches the issue from the unique perspective of their own theology. Their members hold widely varying viewpoints as to when abortion is morally justified. Not one of our coalitional members, including faith groups of Reform and Conservative Judaism, the United Methodist Church, the Presbyterian Church and the United Church of Christ takes the issue of abortion lightly. We hold in high regard both the value of potential life and freedom of choice.

The issue of abortion reveals sincere religious beliefs and intense religious differences. Religious views on the abortion issue range from the belief that abortion is an obligation—if needed to preserve the life or well-being of the pregnant woman—to the belief that abortion is a sin forbidden by divine authority. Within this spectrum are other views including the importance of promoting responsible parenthood and preserving health and well-being of existing, living persons.

This plurality of beliefs in the religious community necessitates that the abortion decision must remain with the individual to be made on the basis of conscience and personal religious conviction, free from governmental interference. Our country's Bill of Rights that guarantees religious freedom to all, requires no less.

Many Protestant and Jewish faith groups have developed a rational and sensitive response to the abortion debate based on the following sound principles.

> First, that in our pluralistic society, no one religious viewpoint on the beginning of human life should be imposed on all Americans by secular law.
>
> Second, that abortion is a moral and theological concern, and that an abortion decision should be the result of thoughtful consideration, based on one's own conscience and religious beliefs.
>
> Third, that there are some instances in which abortion may be a moral alternative to a problem pregnancy.

Beyond these sound principles, much diversity in doctrine and belief exists.

The Coalition believes that abortion can be a moral decision. We believe that no-one but the woman herself can possibly know what is the right course of action in her unique and difficult situation. "No-one" means no one church, no one legislature, no one elected official, and no one protester. No- one, but the woman herself.

Many organized religious groups adhere to basic respect for individual conscience on abortion precisely because of the variety of views held by their members. The Presbyterian Church (USA) adopted the following policy statement in 1983 at the 195th General Assembly and reaffirmed it in 1992 at the 202st Assembly: "The Presbyterian Church exists within a very pluralistic environment. Its own members hold a variety of views. It is exactly this plurality of beliefs that leads us to the conviction that the decision regarding abortion must remain with the individual, to be made on the basis of conscience and personal religious principles, free from governmental interference. Just as the decision to become a parent requires a responsible exercise of stewardship, reflecting moral and religious concerns, so does the decision to not become a parent." This Presbyterian approach emphasizes that God

alone is Lord of the conscience, and that God gives each individual faced with a moral choice arising from sexual activity the power and the freedom to make moral choices regarding even the most serious questions.

Respect for individual conscience is the basis for the American Baptist Churches' position on abortion. Historically, abortion has been treated as a matter for individual conscience in keeping with the religion's foundation in individual voluntary baptism and commitment to responsible families and parenthood. In 1987, the General Board of the American Baptist Churches passed a resolution which declared, "We are divided as to the proper witness of the church to the state regarding abortion. Consequently, we acknowledge the freedom of each individual to advocate for a public policy on abortion that reflects his or her beliefs."

Other Protestant Churches have declared their support for a woman's choice regarding abortion because of potential risks to the life or physical or mental health of the mother, because of concerns about the social situation in which the infant might be born, and because of instances of severe deformity of the fetus. The United Methodist Church, for example, resolved in 1984 and reaffirmed in 1988 that "Our belief in the sanctity of unborn human life makes us reluctant to approve abortion. But we are equally bound to respect the sacredness of the life and well-being of the mother, for whom devastating damage may result from an unacceptable pregnancy. In continuity with past Christian teaching, we recognize tragic conflicts of life with life that may justify abortion, and in such cases we support the legal option of abortion under proper medical procedures. We cannot affirm abortion as an acceptable means of birth control (contraceptive), and we unconditionally reject it as a means of gender selection."

The Episcopal Church USA reaffirmed its support for women's rights over their own bodies at its 1988 General Convention. They urged "that any proposed legislation on the part of national or state governments regarding abortions must take special care to see that individual conscience is respected, and that the responsibility of individuals to reach informed decisions in this matter is acknowledged and honored."

Thus, there is no consensus within the religious community on the issue of abortion. Neither is there agreement on the question of when life begins. We hope, though, there can be some agreement and respect among Protestant, Catholic and Jewish faith groups to accept the diversity of beliefs on the issue of abortion in the context of religious freedom.

The Supreme Court's unfortunate ruling in the Bray v. Alexandria Women's Health Clinic underscored that women and medical personnel will continue to be subjected to the whims of terrorists until laws are passed to ensure women's safe access to health care services. I was personally outraged by the Court's failure to recognize that a law that offers protection from mob violence to one group—such as African American children seeking an education—would not also apply equally to another group—namely, our women seeking medical services at medical facilities.

Conclusion: The 36 member faith groups of the Religious Coalition for Abortion Rights applaud Senators Kennedy, Boxer, Campbell, Feinstein, Harkin, Metzenbaum, Mikulski, Simon, Robb, Wellstone, Pell, Moseley-Braun, and Feingold for introducing the Freedom of Access to Clinic Entrances Act of 1993. We urge this committee to respect religious liberty and a woman's right to choose—freedom of choice means little without guaranteed freedom of access—through your support of this bill.

STATEMENT OF DIANE WAHTO

I have been doing clinic support at the Wichita Women's Center located at 700 N. Market for a year. During that time I have witnessed several acts of violence, intimidation, and harassment against both patients and clinic support volunteers. One morning, I arrived at between 6:30 and 7 a.m. to find a man bolted to the front door of the clinic with a neck lock. One of the clinic support volunteers had interrupted another man who had attempted to bolt himself to the back door. By the time the police arrived and the Rescue Unit got the man disconnected from the door, 3 hours had elapsed. In the meantime, patients had to park in the front lot and be escorted through yelling antis with ugly fetus pictures to the back door. Not one patient was denied service that day, but why did they have to endure that kind of harassment to take care of something that was their private business.

On another occasion, several antichoice people had bolted themselves together with arm locks and then bolted themselves to parts of the building in order to impede access. In the back, they had succeeded in turning off the gas main and bolting themselves to the meter. In the front, a couple of clinic volunteers had caught the arm of the anti who was to attach herself to the door and held on to her for an

hour while the police went through the process of arresting these people and detaching them. During this time, patients entered the clinic by stepping over the reclining antis, listening to their bible verses and condemnation. Again, no patient was denied service, but again, why should a woman have to endure this type of harassment and intimidation.

Two weeks ago, a patient had to be transported to Wesley Hospital by ambulance after suffering complications during an abortion procedure. As the woman was being carried on to the ambulance, clinic support people literally fought off violent antis who were trying to get to the patient and interfere with her. We also had to hold up shields to keep the antis from taping this patient as she was put into the ambulance. Why on earth they would want to endanger this woman's life or harass and intimidate her at this time is beyond my comprehension. Later, I discovered that many clinic support people had suffered bruises and scrapes at the hands of the antis who were determined to get to this woman.

These are just three of the worst instances of patient interference. Clinic support people have stopped antis who were rushing patients to try to stop them from going into the clinic, one of our people was punched in the abdomen when he (the clinic support person) was trying to keep the anti away from a patient's car, one of the antis consistently kicks and punches clinic support personnel when he thinks no one is watching him. Brad Bennett, a local self-appointed preacher, stands outside the clinic and preaches in a loud voice condemning the patients and the doctors. One of the doctors has had his tires slashed. The antis regularly picket the doctors' houses and harass family members in fact, our group, the Freedom of Choice Action League, has begun confronting the antis at the doctors' houses and running them off. These people are bullies and a show of force will make them back down.

My question is, why do we as average citizens, have to do the work of protecting patients and doctors going about their private business; why do patients, doctors, and clinic support people have to fear violence every time the clinic is open? We need the law behind us. I support the antis right to express their opinion, there's no question about that. But here in Wichita they've gone far beyond the expression of opinion.

When Operation Rescue came to town, it took the Federal Marshals to control them. The local authorities either didn't have the desire or the manpower to do what needed to be done. It was chaos in this city for weeks until Patrick Kelly did what was necessary to get the situation under control. That chaos repeats itself on a smaller scale every time a clinic is open for business. These antis won't stop the violence, intimidation, and harassment until they know the authorities mean business. That's why we need the Freedom of Clinic Access bill passed into law. Thank you for your consideration.

STATEMENT OF THE FREEDOM OF CHOICE ACTION LEAGUE

Freedom of Choice Action League (FOCAL) was founded in the summer of 1991 when local government in Wichita, KS failed to guarantee safe patient access to Wichita abortion clinics. Since that time, FOCAL has continued to provide badly needed clinic defense on a regular basis.

When Operation Rescue left Wichita in 1991, it left in place an organization which continues to daily harass the clinics, patients and doctors. Antiabortion activists regularly intimidate patients by: shouting and yelling, approaching cars with literature, photographing and video taping patients, recording license tag numbers, blocking driveways, and forming car caravans that disrupt traffic.

Patients react to this intimidation with anger, fear, tears and humiliation. Some patients have even said they carry mace or weapons for self defense.

In addition to the daily harassment, antiabortion activists in Wichita have resorted to the following over the last 2 years: glueing clinic locks, turning off gas service, bomb threats, stink bombs, rushing clinic doors, chaining themselves to gates and doors of clinics, and firing shots through clinic windows.

Keeping abortion legal will not guarantee availability if doctors refuse to provide this service because of terrorist tactics. In Wichita, antiabortion activists intimidate doctors by: A making harassing phone calls, contacting the families and friends of doctors, leafleting doctors' neighborhoods, picketing doctors' homes, circulating "wanted" posters, death threats, slashing automobile tires, and character assassinations (including public allegations of drug abuse).

Antiabortion activists have intimidated doctors, teachers and students at the University of Kansas Medical Center of Wichita by picketing, leafleting and threatening harassment of a medical student who considers providing abortion services. Even after interns complete their training and leave Wichita, they may be subjected to harassment in their new communities. A physician practicing at the Wichita Family

Planning Clinic, after being subjected to much of the above, finally resigned when antiabortion activists threatened to disrupt her wedding.

FOCAL's experience has been that when local government fails to protect access to clinics an intolerable burden is placed on a woman's right to reproductive freedom. Women seeing abortion services are uniquely vulnerable to harassment and deserve special legislative protection.

STATEMENT OF DONALD MCKINNEY

My name is Donald McKinney. I am an attorney from Wichita, KS. I personally witnessed many of the events of the Summer of Mercy in Wichita, in 1991, and the events in our city in the summer of 1992, involving the "Lambs of Christ." I have witnessed about one dozen "rescues", act of civil disobedience by Christian believers blockading doors of abortion clinics. Additionally, I have witnessed three or four dozen demonstrations outside of abortion clinics which did not involve civil disobedience but instead involved first amendment activities including exercise of religious belief and free speech. Typically, these activities include worship through singing, prayer, and Bible reading, as well as religious and political expression through signs, song, and speech. The "rescues" also involve reverent worship through singing of religious songs. The conduct of the persons engaged in these activities has been consistently peaceful and solemn. I have witnessed some loud arguments, but have never seen any acts of violence, "harassment", or intimidation by any person engaged in these activities.

On the other hand, I have witnessed numerous acts of violence by so called "clinic support" persons. My brother and a friend were walking several blocks away from an abortion clinic when an abortionist swerved his vehicle into them, striking my brother. He sustained injury and was transported to a hospital by ambulance. The local police refused to press any charges, and instead protected the abortionist. I have a tape of a police lieutenant announcing to the media a false version of events: that the incident occurred at the home of the abortionist, who was merely backing out of his drive when someone hit his vehicle and down, feigning injury. According to this version, the person then walked away unharmed. Because of this coverup by falsehood, and the refusal of local authorities to act against the abortionist, we were forced to file a civil lawsuit against the abortionist.

I have collected affidavits from other persons who were hit by cars driven by another abortionist on two previous occasions. The abortionist swerved into them as they practiced first amendment freedoms on a public sidewalk by the driveway of an abortion clinic. In each case, local police were called but refused to take action. I also have affidavits from persons who witnessed and/or were victims of an assault which occurred one evening during subfreezing weather. Abortion supporters dumped water from the roof of the abortion clinic onto pro-life protesters who were exercising first amendment freedoms on the sidewalk below. The victims were told by clinic personnel that the water contained urine, blood, and abortion byproducts. I was present when the police arrived. We informed the police that we wanted to file a complaint. The perpetrators were pointed out. Again, the local police refused to take action. The officer, who was wearing a coat over his badge, refused to identify himself and looked away.

I witnessed a woman assaulted by a male clinic supporter who blindsided her with a body block. That same abortion supporter lit a cigarette and held it near the hair of women pro-lifers as they sang worship songs. He blew smoke in their faces and berated them with obscene language. One pro-life sidewalk counselor was shot in the back with a pellet gun. A window on my vehicle was shot out. Many pro-lifers have been physically assaulted or have had property damaged. Foul, abusive language, intended to incite violence, is a common tactic of abortion supporters.

I could cite many more cases, but the point is this: the current political push for Draconian measures against the pro-life movement has been grounded in a misconception fostered by the media and the campaign donations of the abortion industry: there is violence, abusive language, and intimidation at abortion clinics, but the vast majority of such behavior comes from the abortion supporters, not those persons practicing religious expression. I have seen numerous religious ceremonies and prayer meetings disrupted by disorderly conduct and loud filthy language by abortion protesters, while local police look the other way. There is a need for Federal legislation to protect constitutional rights at abortion clinics, but the need is for legislation to protect first amendment freedoms of speech and religious expression. These rights have long been recognized by our courts as fundamental rights, as opposed to the penumbral, secondary right of privacy which has been interpreted—relatively recently in our constitutional jurisprudence—as the basis for the right to terminate an unborn child.

There is a second misconception underlying the push for Federal legislation to punish the pro-life movement. That is the oft heard complaint that local law enforcement authorities do not adequately protect abortion clinics. The city of Wichita has spent millions of dollars to keep one late-term abortionist in business, despite massive public opposition and thousands of arrests. In the summer of 1992, the SWAT team took up positions on the roof of the abortion clinic, the police helicopter hovered overhead, and even ATF forces were on hand. Tens of thousands of police manhours, dozens of police cars, jeeps, motorcycles, and horses were used to keep the termination of unborn babies going smoothly. The city hired numerous informants. Only later were we told that the city did not have adequate resources to fight gang warfare, and could hire only two informants for that purpose, despite the fact that Wichita has one of the worst gang problems of any city in the country. Businesses plagued by gangs were allowed to go out of business, without massive police protection.

In the summer of 1991, local police rode horses into a crowd of pro-lifers. I personally interviewed, in video tape, a woman who was injured. I saw police savagely kick peaceful protesters who were down on their hands and knees. Mace was used. Thousands of arrests were made and prosecuted by local authorities.

Today, five or six police cars and numerous officers will quickly respond when a call goes to the police from abortion supporters. When pro-lifers make a call, eventually one car arrives containing one or two disinterested officers, who rarely take action. Pro-lifers are often arrested for violating a new city noise ordinance, while abortion supporters blast boom boxes and shout obscenities with impunity. One 83-year old women was peacefully holding a protest sign when she was arrested for violating a new city ordinance concerning "interfering with a lawful business." A jury ultimately found her innocent. She had been arrested by local police at the behest of a clinic operator and an off-duty policeman working for the clinic.

The abortion industry has a financial hold on the Wichita police department. Abortion clinics pay generous wages to numerous officers who work off-duty at clinics. These officers, working for the abortionists, wear uniforms, badges, and guns and other equipment paid for by the tax money of Wichitans, including pro-life taxpayers who abhor abortion. When complaints were made about this practice, the local police union joined with abortion clinics to urge the relationship be continued. Such officers, and their friends in the department, have a financial incentive to favor clinic supporters and use their arrest powers selectively against pro-life first amendment protesters. One officer testified that he had been instructed by his supervisor to "arrest pro-lifers."

The point is this: local authorities have been very active in protecting abortion clinics, even to the point of passing new ordinances and spending huge sums. Federal officers and Federal tax dollars are not needed. Oppressive Federal involvement such as that suggested by Janet Reno will only escalate violence. That is a lesson she should have learned from Waco.

Statement of Professor David M. Smolin

The purpose of this testimony is to present relevant analysis as to the constitutionality of S. 636. The testimony represents my personal views as a law professor, teaching and writing in the field of constitutional law, and is not intended to represent the views of my employer, Cumberland Law School of Samford University.

This testimony will also respond to the written and oral testimony of the Attorney General of the United States, Janet Reno, and Professor Laurence Tribe of the Harvard Law School, presented to the committee on May 12, 1993.[1]

I.

The language of S. 636 clearly discriminates against certain forms of conduct because of the connection of that conduct to the subject matter of abortion. Thus, the prohibited conduct relating to persons is only punished where done because the protected person was "obtaining abortion services" or "lawfully aiding another person to obtain abortion services." Similarly, the forbidden conduct relating to damaging or injuring the property of a medical facility is only punished where the destruction is done "because such facility provides abortion services." Professor Tribe, both in his oral and written testimony, clearly admits that the Act picks out abortion as a subject.

The picking out of a specific subject matter for special restrictions is, of course, in itself constitutionally suspect. Thus, for example, in Police Department of Chicago

[1] I have viewed a videotape of the oral testimony of the Attorney General and Professor Tribe, but have not as yet had access to an official transcript.

v. Mosley, 408 U.S. 92 (1972), the Supreme Court invalidated a city ordinance prohibiting all picketing within 150 feet of a school, except peaceful labor picketing. The Court explained its holding as follows:

> In this case, the ordinance itself describes the impermissible picketing not in terms of time, place, and manner, but in terms of subject matter. The regulation "thus slip[s] from the neutrality of time, place, and circumstances into a concern about content." This is never permitted.

408 U.S. at 99.

Thus, it is significant that Professor Tribe admits that "S. 636 does not reach an individual whose physical activities happen to obstruct access to an abortion clinic but do so only because, for example, that individual is engaged in a family squabble or a labor dispute. . . ."[2]

Professor Tribe attempts to escape the conclusion that S. 636 contains impermissible subject matter discrimination by arguing that the Act "does not prohibit picketing, demonstrating, speech-making, talking or otherwise expressing one's ideas, unless and until someone engages in physical conduct that is intended to prevent or punish abortion."[3] Professor Tribe in so stating incorrectly minimizes the potential effect of S. 636, as currently drafted, upon speech-related activities. The literal language of S. 636 establishes a violation based on a "threat of force that attempts to intentionally intimidate," or upon "physical obstruction that attempts to intentionally interfere with" a person. Such terms could go far beyond "physical conduct that is intended to prevent or punish abortion." The difference is significant, as to the extent that S. 636 covers speech-related activities, and picks out the subject of abortion for special restrictions, it is subject to constitutional invalidation under the first amendment. Indeed, to test whether the difference is significant, it would be interesting to see whether the sponsors of S. 636 would accept an amendment limiting its reach to "physical conduct that is intended to prevent or punish abortion."

Even expressive conduct, however, receives significant protection under the free speech clause. Professor Tribe therefore has to discuss whether S. 636 satisfies the Supreme Court's test in United States v. O'Brien, 391 U.S. 367 (1968), which requires, in part, that laws regulating expressive conduct serve important or substantial governmental interests unrelated to the suppress ion of free expression, and that the incidental restrictions on first amendment freedoms are no greater than is essential to the furtherance of such interests. Professor Tribe suggests that S. 636 satisfies this O'Brien test, essentially because it is a viewpoint neutral rule prohibiting violence against those who exercise (or assist the exercise of) the abortion right.[4]

Professor Tribe thus feels compelled to make an elaborate argument that S. 636 is not viewpoint specific. Professor Tribe claims that S. 636 does not favor the abortion rights viewpoint over the antiabortion viewpoint. Because Professor Tribe's argument is so counter-intuitive at this point, it is worth underscoring he feels compelled to make it. Essentially, the Court is likely to invalidate a regulation of expressive conduct, or of speech, that is viewpoint discriminatory. Viewpoint discrimination (the disfavoring of one side of an argument) is far more heinous a constitutional sin than subject matter discrimination (the disfavoring of a particular subject), because it more profoundly interferes with the free marketplace of ideas.

As a matter of common sense, S. 636 seems to disfavor the antiabortion viewpoint. For example, even Tribe's summary of S. 636 as relating to "physical conduct that is intended to prevent or punish abortion" seems to disfavor the antiabortion viewpoint: Those desiring to prevent or punish abortion would in the normal course of language be described as "antiabortion." The language of the Act itself alternatively punishes those who seek to "intimidate" a person from obtaining or aiding abortion services. This language, as a matter of common sense, seems to target those with antiabortion animus.

As a matter of application as well, S. 636 appears to target antiabortion animus. For example, if a group of abortion rights protestors or clinic escorts in effect intimidate, injure, or interfere with a woman seeking abortion services, as may sometimes occur, such effect would be , and the abortion rights persons would be exonerated because of a lack of intent. A blockade of a medical facility containing both an abortion clinic and animal research facilities, conducted by a group of animal rights ac-

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[2] Written Testimony of Laurence H. Tribe, at 20.

[3] Written Testimony of Laurence H. Tribe, at 17–18.

[4] The Attorney General in her written testimony makes a similar argument. Written Testimony of Janet Reno, Attorney General, at 17–20. The Attorney.General's argument, however, is more conclusory and less developed than Professor Tribe's, so it seems appropriate to focus analysis on Professor Tribe's arguments.

tivists, would not be a violation of the Act even if it closed the abortion facility for the day. A firebombing of a crisis pregnancy center offering services to assist women to carry their children to term, which is also the exercise of a constitutional right, would not be covered under the Act. An attack upon a pregnant woman by a man seeking to prevent her from carrying her child to term would not be actionable under the Act, even though the same attack conducted to prevent her from securing an abortion would be actionable. A clinic closed by a labor demonstration, as noted above, would not be covered by the Act.

Professor Tribe, in his oral testimony, suggested that the law can legitimately require intent because "even a dog knows the difference between being kicked and being tripped over."[5] S. 636, however, goes far beyond this distinction, and asks why the kickingis being done, and implicitly, what message is being received by the one who is kicked, or others viewing the event. It thus appears to go beyond content-discrimination, to viewpoint discrimination.

Professor Tribe presents two examples as an attempt to buttress his counter-intuitive argument that S. 636 is not viewpoint specific. First, he suggests that abortion rights activists who blockade a clinic to dramatize the plight of women would be liable under the act. Second, he argues that a mercenary would be guilty, even if the mercenary acted for money rather than based on antiabortion animus.[6]

Professor Tribe's exotic examples at best illustrate that S. 636 may not be perfectly viewpoint discriminatory. It certainly does not prove, however, that S. 636 is, as the constitution requires, lacking in viewpoint discrimination. One could, of course, differ even with these exotic examples. Thus, the abortion rights demonstrators who blockaded a clinic would only be guilty if they intended to intimidate, interfere with, or injure, abortion seeking women. They certainly would NOT intend to "intimidate" or "injure" abortion-seeking women. As to the word "interfere," it seems more plausible to say that the demonstration would be "intended" to facilitate, rather than interfere with, the exercise of the abortion right. Indeed, if such an event occurred it would, more than likely, occur in coordination with the clinic during a time when there were no real patients coming in. As for the mercenaries, it seems logical to punish them, as they are actually carrying out the "intent" of those who pay them. In any event, it is hard to believe that the modern Court would find a law not to be viewpoint discriminatory merely because it failed to punished a mercenary.

This point is best made by applying it to the Supreme Court's invalidation of the Flag Protection Act of 1989. Prior to passage of that Act, the Supreme Court in Texas v. Johnson, 491 U.S. 397 (1989) had held that a Texas statute criminalizing the desecration of the United States flag was unconstitutional as applied to an individual who set a flag on fire during a political demonstration. The Court had held that the government's asserted interest in preserving the flag as a symbol was related to the suppression of free expression within the meaning of O'Brien. The Federal Flag Protection Act of 1989 was a response to Texas v. Johnson. Professor Tribe on August 1, 1989, presented testimony on the constitutionality of the Flag Protection Act to the Senate Judiciary Committee.[7] Professor Tribe testified that "in all likelihood" the Federal Flag Protection Act would, despite Texas v. Johnson, be upheld.[8] Professor Tribe argued that the Federal Act permissibly protected the physical integrity of the Flag independent of whatever message a flag-destroyer happens to convey.[9] Professor Tribe similarly rejected the view that the Federal Act was merely a "trick" designed to get around the Supreme Court's ruling while still essentially seeking to censor anti-American views.[10] indeed, Professor Tribe rejected the latter argument, despite admitting that he himself had developed this argument in the first and second editions of his treatise on Constitutional Law, the second of which was dated approximately a year before his testimony.[11]

The Court, of course, proved that Tribe's treatise had been more accurate than his testimony:

> Although the Flag Protection Act contains no explicit content-based limitation on the scope of prohibited conduct, it is nevertheless clear that the Government's asserted is "related 'to the suppression of free expression,'" 491 U.S. at

[5] This is a paraphrase of Professor Tribe's wording.
[6] Written Testimony of Laurence H. Tribe, at 13–14.
[7] Testimony of Laurence H. Tribe Before The Senate Judiciary Committee Regarding Statutory and Constitutional Responses To The Supreme Court Decision In Texas v. Johnson, August 1, 1989.
[8] Id. at 8.
[9] Id. at 3–6.
[10] Id. at 3–4.
[11] Id. at 4.

> 410, and concerned with the content of such expression . . . Moreover, the precise language of the Act's prohibitions confirms Congress' interest in the communicative impact of flag destruction. The Act criminalizes the conduct of anyone who "knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag." Each of the specified terms—with the possible exception of "burns"—unmistakably connotes disrespectful treatment of the flag and suggests a focus on those acts likely to damage the flag's symbolic value. And the explicit exemption . . . for disposal of "worn or soiled" flags protects certain acts traditionally associated with patriotic respect for the flag.

United States v. Eichman, 496 U.S. 310, 315–17 (1990).

The Court, in other words, was not to be so easily fooled as to whether viewpoint discrimination was present in the Federal Act, despite the absence of explicit "content-based" limitations. Thus, though Professor Tribe, and others, can certainly concoct a clever argument that an Act is viewpoint-neutral, the Court will not necessarily accept such an argument. It is interesting to note that Professor Tribe's two examples of viewpoint neutrality in regards to S. 636 were implicitly rejected by the Supreme Court in Eichman. Thus, under the Flag Protection Act an individual who knowingly mutilated, defaced, or burned a flag in order to dramatize the need to enforce or enact such a law would be liable under the Flag Protection Act, even though they subjectively were doing so for the ultimate purpose of urging greater protection of the flag. (This hypothetical is unlikely, but no more so than Professor Tribe's hypothetical of abortion rights activists blockading an abortion clinic to dramatize the plight of women.) Second, a mercenary hired to mutilate or deface a flag would be liable under the Flag Protection Act, even if the person had no personal animus against the American flag. Yet, despite the fact that the Flag Protection Act was not perfectly or overtly viewpoint discriminatory, the Court nonetheless found that it violated the O'Brien test.

The above analysis demonstrates that Professor Tribe's ability to produce arguments in support of a position does not guarantee that the U.S. Supreme Court will accept such arguments. There remains a substantial likelihood that the U.S. Supreme Court would invalidate S. 636, as currently drafted, because it discriminates on the basis of viewpoint and/or content, because the interests it serves are too closely related to the suppression of free expression, and because its restrictions upon free expression are greater than what is essential to the protection of persons and property involved in abortion.

II.

Perhaps because he is aware of the weakness of his proof that S. 636 is viewpoint neutral, Professor Tribe goes on to argue that the proposed Act is constitutional by analogy to Federal antidiscrimination and civil rights laws.[12] The Attorney General similarly analogizes to various Federal statutes, including Federal civil rights statutes.[13] I agree with Professor Tribe that the U.S. Supreme Court is likely to uphold the Wisconsin "hate crimes penalty enhancer" currently under review in State v. Mitchell, No. 92–515 (argued April 21, 1993), and that such a statute is distinguishable from the St. Paul ordinance invalidated by the Supreme Court in R.A.V. v. City of St. Paul, 112 S.Ct. 2538 (1992). State v. Mitchell involves the enhancement of the penalty for a separate and preexisting crime against the person, aggravated battery, such enhancement being based on the intentional selection of the battery victim because of his race. The ordinance invalidated in R.A.V., by contrast, specifically targeted the expressive nature of certain symbols, such as a Nazi Swastika, because of the hateful message sent by such symbols.

The comparison of R.A.V. to is relevant both to the question of viewpoint and content discrimination, and to the related questions of overbreadth and vagueness. Both issues turn, at least in part, on the scope of S. 636. Thus, for example, if S. 636 only covered threats of violence or actual violence, it would be more like the penalty enhancement statute likely to be upheld in State v. Mitchell. By contrast, if S. 636 extends to political protests, or focuses on the message, then it is more like flag burning at a political protest, or like the ordinance invalidated in R.A.V. For overbreadth and vagueness purposes, it is generally true that whether a term like "interferes with" is unconstitutionally vague or overbroad depends on the broader textual and factual context of the statute.

Thus, in Dorman v. Satti, 862 F.2d 432 (1988), cert. den., 490 U.S. 1099 (1989), the Second Circuit held that a Connecticut statute making it criminal to "interfere

[12] Written Testimony of Laurence H. Tribe, at 18–3.
[13] Written Testimony of Janet Reno, Attorney General, at 19–20.

with the lawful taking of wildlife by another person" was unconstitutionally broad and vague on its face. The Second Circuit stated that the term "interfere" "can mean anything" and "is so imprecise and indefinite that it is subject to any number of interpretations." 862 F.2d at 436. The court noted that the Connecticut "Hunter Harassment Act" "clearly is designed to protect hunters from conduct—verbal or otherwise—by those opposed to hunting," and therefore noted that the Act could be considered a content-based restriction, even though its language was content-neutral. 862 F.2d at 437. The court, however, invalidated the Act even if viewed as content-neutral, due to the vagueness and overbreadth of the Act.

The Second Circuit relied in part on the Supreme Court's invalidation, as facially overbroad, of an ordinance making it unlawful to "interrupt" a police officer in the performance of his duty. Houston v. Hill, 482 U.S. 451 (1987). The Second Circuit found that the term "interfere," like the term "interrupt," "deals not with core criminal conduct, but with speech." 862 F.2d at 437. See also City of Milwaukee v. Wroten, 466 N.W.2d 861 (Wis. 1991) (phrase "interfere with any police officer" is unconstitutionally overbroad).

The purpose and language of the Connecticut Hunter Harassment Act invalidated in Dorman v. Satti was quite analogous to S. 636; the Connecticut Act sought to protect hunters from animal rights activists while S. 636 seeks to protect those using or providing abortion services from prolife activists. Dorman thus suggests the possibility that S. 636 could also be unconstitutionally overbroad and vague.

Dorman, Wrotan, and Hill demonstrate that terms like "interferes with" be unconstitutionally vague and overbroad. The proponents of S. 636, however, appear to rely primarily on an analogy to 18 U.S.C. §245 and 42 U.S.C. §3631, constituting, respectively, Title I and Title IX of the Civil Rights Act of 1968. These criminal civil rights statutes contain the language "by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with." Professor Tribe argues that the similarity of language between S. 636 and these existing Federal civil rights statutes demonstrates that S. 636 is constitutional.[14] It must therefore be asked whether S. 636 is more analogous to the Connecticut Hunter Harassment Act, than it is to Titles I and IX of the Civil Rights Act of 1968.

Upon examination, S. 636 as currently written appears closer to the Connecticut Hunter Harassment Act than to 18 U.S.C. 245 or 42 U.S.C. §3631. First, the latter civil rights statutes are limited to acts done by force or threat of force, while S. 636 may also be committed by physical obstruction. This additional, undefined, term, moves S. 636 sharply beyond the range of acts committed by violence, or threat of such. A sidewalk counselor stepping in front of a pregnant woman to offer her literature cannot know, as the Act is currently written, whether a momentary "physical obstruction" violates the Act. As Judge Learned Hand once noted, "[o]ne may obstruct without preventing, and the mere obstruction is an injury . . . for it throws impediments in its way." Masses Pub. Co. v. Patten, 244 Fed. 535, 541 (S.D.N.Y. 1917). Moreover, because of this terminology Professor Tribe was unable to assert what steps a mother may take to ensure an opportunity to talk with her pregnant daughter. If the mother blocks the door, has She "by physical obstruction" interfered with her daughter?

By contrast, the legislative history of 18 U.S.C. §245, as interpreted by the U.S. Supreme Court, sharply focuses the terms "force or threat of force" on acts or threats of violence, and especially crimes of racial violence. Johnson v. Mississippi, 421 U.S. 213, 224–27 (1975). The identical language in 42 U.S.C. §3631, which was derived from the same Act, Pub. L. 90–284, would presumably have the same meaning. The subsequent history of application and interpretation of these provisions of the Civil Rights Act of 1968 have confirmed their limitation to violence or threats of violence. The limited number of cases have involved clearly violent and dangerous conduct, such as killings, serious batteries, or threats of such, as evidenced by even a cursory review of the annotations to these code sections. The critical addition of the term "physical obstruction" in S. 636, by contrast, profoundly widens the scope of conduct beyond that of core criminal conduct, thereby altering the constitutional context for evaluating terms such as "intimidates" or "interferes with.

This difference is underscored by the stark difference in legislative history, as it exists thus far for S. 636. It is quite clear that an important target of S. 636 are the clinic blockades, or sit-ins, at abortion facilities, a technique most closely associated with Operation Rescue. These blockades are mentioned in Senator Kennedy's introduction of S. 636, in the findings of the Act, in the comments of the Senators

[14] Written Testimony of Laurence H. Tribe, at 21–23.

during the hearings,[15] and in the witnesses called to support S. 636. It is likely that the addition of the term "physical obstruction" to the Act, a term not present in 18 U.S.C. §245 or 42 U.S.C. §3631, stems from a desire to ensure that such blockades are covered by the Act. Moreover; although there has been much discussion of the murder of Dr. Gunn, and of occasional firebombings or arson at abortion facilities, it is clear that the original impetus for the legislation arises from the Supreme Court's decision in Bray v. Alexandria Women's Health Clinic, 113 S.Ct. 753 (1993), a case concerning Federal jurisdiction over Operation Rescue clinic blockades. Moreover, the Attorney General repeatedly relied on the inability of State and local law enforcement officials to adequately address the problem as the rationale for Federal legislation, and used as her example the Operation Rescue blockades of abortion facilities in Wichita, Kansas.[16] There has been no suggestion that the authorities in Florida are unable to adequately prosecute and punish the individual responsible for Dr. Gunn's murder, and also no suggestion that local authorities are overwhelmed by the few cases of arson. Given the great reliance on the inability of local law enforcement to address the problem, it is clear that abortion clinic blockades, rather than violent acts currently well handled by local law enforcement officials, are central to the purposes of S. 636.

A clinic blockade, or sit-in, however, is clearly a form of political protest. Moreover, such acts are not violent, at least not as that term is used in relation to the acts of violence that motivated the passage of 18 U.S.C. §245 and 42 U.S.C. §3631. Of course, there has been to some degree a dispute as to the demeanor of protestors at Operation Rescue events. However, it is clear that even forceful, demeaning, and coercive speech which most prolifers would abhor, is protected by the first amendment. Cf. NAACP v. Claiborne Hardware, 458 U.S. 886 (1982). There has been no adequate showing that local authorities would be unwilling to prosecute serious crimes against the person associated with such political protests. Finally, the legislative history of S. 636 indicates a view that the blockades or sit-ins in themselves are a sufficient evil to merit serious penalties, even if the conduct of the anti-abortion protestors is otherwise peaceful.

A clinic blockade is more like a sit-in at a lunch counter, as a matter of political tactics, than it is like a serious battery or other truly violent act. Such blockades, like sit-ins at lunch counters, send a clear political message in a forceful way, while simultaneously seeking to (at least temporarily) protect a claimed right: the right to life, in the former instance, and the right to be served without discrimination, as to the latter situation. Both tactics simultaneously and forcefully interfere with another claimed right: the right to abort, in the first instance, and the right to control private property, in the latter. Neither act; however, is violent, in the sense that beating or shooting someone because of their race, or some other reason, is violent.

S. 636, therefore, even if it were restricted to trespasses that blockade abortion facilities, would pose the unanswered question of whether this form of political protest, which is not new, and is not now restricted to prolife protestors, can receive significantly enhanced penalty only when practiced by proponents of one viewpoint. Abortion rights protestors, animal rights protestors, and homosexual rights activists remain free to conduct blockades of medical or other facilities, and not face Federal penalties. Certainly the States are free to punish all those who trespass, on a non-discriminatory basis as to viewpoint. But neither the State nor the Federal Government should be able to subject one type of political protestor who trespasses, to significantly greater penalties.

The fact that S. 636 is primarily focused on a form of political protest, rather than on violent acts against the person and property of others, and is broadly worded, also raises a host of additional questions not usually implicated by 18 U.S.C. §245 and 42 U.S.C. §3631. As noted above, it is difficult for a sidewalk counselor or parent to know what is meant by "physical obstruction" which "interferes with" or "intimidates" a person. This broad language does not require that a trespass or assault be committed, making its breadth, in the context of political protest, difficult to determine. The fact that sidewalk counseling is also a typical part of an Operation Rescue blockade aggravates the question of how far the Act would extend. The unwillingness of the Attorney General, during her oral testimony, to answer hypotheticals related to the scope of S. 636, seriously undercuts her claim in her written testimony that "(m)en and women of common intelligence will have little difficulty in discerning what conduct it prohibits."[17] This kind of uncertainty, in an

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[15] Note, for example, the discussion by Senators from Minnesota during the May 12, 1993, hearing of the plans of Operation Rescue to come to Minnesota, and of the need to enact the law quickly to respond to these plans.

[16] Written Testimony of Janet Reno, Attorney General, at 4–6.

[17] Written Testimony of Janet Reno, Attorney General, at 20.

area of core political speech, see Frisby v. Schultz, 487 U.S. 474, 479 (1988) (statutes limiting expression related to abortion operate "at the core of the first amendment"), is quite likely to chill such speech and expressive conduct.

Moreover, the concept of "threat of force" which attempts to interfere with, or intimidate, in the context of political protest, could be quite broad. A threat to blockade an abortion facility could be literally a violation, even though such a threat would apparently be protected under Brandenburg v. Ohio, 395 U.S. 444 (1969). A number of courts have noted that even some illegal acts threatened or committed in the course of political protests have some degree of constitutional protection. Thus, the Ninth Circuit, in invalidating Montana's intimidation statute as unconstitutionally overbroad, stated:

> The civil rights activist who states to a restaurant owner, "if you don't desegregate this restaurant I am going to organize a boycott" could be punished for the mere statement, even if no action followed. The example is not unduly hypothetical, and the threatened activity-itself would raise delicate first amendment issues if carried out, to say nothing of its merely being threatened. See NAACP v. Claiborne Hardware Co., 458 U.S. 886, 928 (1982). . . . Threats of sit-ins, marches in the street, mass picketing and other such activities are frequently threats to commit acts prohibited by law. . . . The State, of course may punish minor infractions when they actually occur. But to punish as a felony the mere communication of a threat to commit such a minor infraction when the purpose is to induce action—a action—by someone, is to chill the kind of "uninhibited, robust, and wide-open" debate on public issues that lies at the core of the first amendment. See New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

Wurtz v. Risley, 719 F.2d 1438, 1442 (9th Cir. 1983).

Similarly, the Seventh Circuit recently noted that in the realm of social or political conflict "threats to engage in behavior that may be unlawful may nevertheless be part of the marketplace of ideas, broadly conceived to embrace the rough competition that is so much a staple of political discourse." United States v. Velascuez, 772 F.2d 1348, 1357 (7th Cir. 1985).

III

An addition reason that 18 U.S.C. §245 and 42 U.S.C. §3631 have been sharply limited to acts or threats of violence is the relatively limited remedies they afford. 18 U.S.C. §245 textually has only criminal penalties, and it has been held that this section does not confer any private right of action. See. e.g., John's Insulation, Inc. v. Siska Constr. Co., Inc., 774 F. Supp. 156 (S.D.N.Y. 1991). In addition, section 245 requires U.S. Attorneys to obtain a certification from the Attorney General or certain designated others that "a prosecution by the United States is in the public interest and necessary to secure substantial justice," before a prosecution may be commenced. These requirements have resulted in the section being used rarely and only after careful screening, even beyond that usually involved in Federal prosecutorial discretion. 42 U.S.C. §3631 also textually contains only criminal penalties, and due to its highly specialized focus on housing, there are very few reported cases.

The lack of a private right of action, sharp controls on the bringing of criminal actions, restriction to "force or threat of force," and legislative history and court interpretation focusing on violence or threats of violence, have clarified and limited the meaning of the terms "interfere with" and "intimidate" in the context of 18 U.S.C. §245 and 42 U.S.C. §3631. By contrast, S. 636's use of broad remedies, its use of the undefined term "physical obstruction," and its different legislative history focusing on obstructions, sit-ins, harassment, loud chanting, sidewalk counseling, and parent-minor daughter interactions creates a situation where the outer reaches of S. 636 would necessarily be tested in literally hundreds of investigations and/or court cases throughout the United States, within a few years of enactment. Thus, S. 636 presents very different constitutional questions than those posed by those provisions of the Civil Rights Act of 1968.

It is useful in particular to examine in detail the broad remedies S. 636 creates, which sharply contrast with the limited remedies of 18 U.S.C. §245.

First, S. 636 permits abortion providers to mandate an investigation by the Federal Government. See (d)(1) (Secretary shall conduct an investigation, on the request of a medical facility providing reproductive health services). Thus, abortion providers would mandate that the Federal Government investigate particular prolife individuals, organizations, or associations, based entirely on the request of abortion facilities.

Second, S. 636 permits private rights of action by abortion providers, including attorney and expert witness fees, injunctive relief, compensatory and punitive damages, and election of statutory damages of $5,000, in lieu of actual damages. This

clearly invites abortion providers to use the courts against prolife activists, and there is no process of prosecutorial discretion to limit abusive lawsuits. Under these circumstances, the outer reaches of the meaning of terms like "physical obstruction," "interferes with," and "intimidates," will be tested.

Third, S. 636, unlike 18 U.S.C. §245, permits U.S. attorneys to commence Federal criminal prosecution without any certification of need by the Attorney General or other designated officials. S. 636 therefore creates an environment in which at least some U.S. attorneys may become politicized and involved in broad campaigns to crush antiabortion activism. This is particularly true given the prospect of using the general Federal conspiracy statute, 18 U.S.C. §371, which criminalizes agreements by two or more persons to commit any offense against the United States. Thus, even if a sidewalk counselor or crisis pregnancy center were not held directly liable under S. 636, if they were seen as acting in conjunction with a clinic blockade they could be investigated, and perhaps charged, under 18 U.S.C. §371. This raises serious constitutional questions regarding the constitutional right of association. See NAACP v. Claiborne Hardware, 458 U.S. 886 (1982). It also raises the prospect of Federal prosecutors conducting investigations and prosecutions of broad segments of the prolife movement.

Fourth, S. 636 permits the Attorney General, or any Federal officials she designates, to become involved in civil actions. Again, the Act seems to envision a broad and activist campaign against prolife activism.

Fifth, 18 U.S.C. §245 and 42 U.S.C. §3631 permit criminal fines up to $1,000, on first offense, if there is no bodily injury, whereas S. 636 permits criminal fines up to $100,000 under the same circumstances.

The comparison of S. 636 to 18 U.S.C. §245, and 42 U.S.C. §3631, is therefore highly strained. These little-used 1968 Civil Rights statutes have been sparingly applied to a certain class of violent acts against persons, and have not been broadly tested as applied to political protests.

IV.

Some of the defects of S. 636 could be alleviated by widening the Act to protect parallel prolife activities. This is particularly important, given the nature of the abortion right. In Planned Parenthood v. Casey, the Court viewed Roe, and the Fourteenth Amendment, as equally protecting the choice to abort, and the choice NOT to abort. 112 S.Ct. at 2811; id. at 2818 (woman has right to choose to "terminate or continue her pregnancy before viability"). The Court further found that "most women considering an abortion would deem the impact on the fetus relevant, if not dispositive, to the decision." 112 S.Ct. at 2823. The Court denied that the abortion liberty included the right to be "insulated from all others" in deciding whether or not to abort. 112 S.Ct. at 2821.

Thus, to the extent that S. 636 inhibits the provision of information, counseling, and medical services to women, that would assist her in deciding whether or not to abort, and/or would assist her in carrying her child to term, it actually interferes with, rather than facilitates, her constitutional rights. S. 636 as drafted threatens to significantly chill such activity.

There are two ways to alleviate (though perhaps not eliminate) this difficulty. First, S. 636 should be made truly viewpoint neutral, by protecting those who would seek to facilitate the right to continue pregnancies to term. This could be done by amending section (a)(1) (A) and (B) as follows:

(A) obtaining abortion, pregnancy, or childbirth services; or

(B) lawfully aiding another person to obtain abortion, pregnancy, or childbirth services;

Similarly, section (2), protecting abortion facilities, could be amended as follows:

(2) intentionally damages or destroys the property of a medical facility or in which a medical facility is located, or attempts to do so, because such facility provides abortion, pregnancy, or childbirth services.

The term "pregnancy or childbirth services" could then be defined in a manner parallel to the definition of "abortion services:"

The term "pregnancy or childbirth services" includes medical, surgical, counselling or referral services related to pregnancy, childbirth, or the care of mother or infant after birth.

Finally, it would be useful to include a definition of "reproductive health services" that included, inter alia, "abortion, pregnancy, and childbirth" services, in order to appropriately expand the range of the Secretary's study under section (c) of the Act.

It should be noted that the literal language of the current version of S. 636, defining abortion services to include "counselling . . . services relating to the termination of a pregnancy" could be literally construed to include prolife counseling.

However, the oral testimony of the Attorney General, Professor Tribe, and the statements of the sponsor, Senator Kennedy, indicate that the term does not carry this meaning. Thus, if the Act is to protect parallel activities to facilitate the decision whether or to abort, and activities to assist women in carrying their children to birth, then the Act should be amended.

It should also be noted that the Act already refers to "harm to maternal or child health associated with delays in obtaining, or failure to obtain, prenatal services," in the section requiring the Secretary to conduct a study. section (c)(1)(C)(iii). Thus, concern for the parallel rights of assistance in carrying a child to term, are not completely foreign to the Act as drafted.

It is relevant that Professor Tribe, in his oral testimony, admitted that the Act could constitutionally be widened to include protection of parallel prolife activities. Such amendment would also go far in protecting the Act against a constitutional challenge that it is unconstitutionally viewpoint specific. Such amendment would also alleviate to some degree the concerns for overbreadth and misuse of the Act. If the Act only protects acts facilitative of abortion, there will be a tremendous temptation to use the Act broadly to reach unwelcome prolife speech and expressive conduct. From the perspective of an abortion provider, the option of childbirth represents a loss of income, and hence such providers will be tempted to prevent all activities that tend to promote abortion alternatives. On the other hand, if the same standard of protection applies to sidewalk counselors and crisis pregnancy centers, then the temptation to overreach will be largely alleviated.

Second, the reach of the Act should be limited to core criminal conduct. The term "physical obstruction" should be eliminated, so that the language more precisely follows that found in 18 U.S.C. §245, and 42 U.S.C. §3631. The term "intimidates" should be defined in the Act as follows:

To intimidate a person means to intentionally say or do something which would cause a person of ordinary sensibilities to be fearful of bodily harm.

Given the possibility of claiming that "psychological injury" resulted from unwanted speech, the term "injury" should be defined as "bodily harm."

The term "interfere with" should be defined as follows:

To interfere with a person means conduct that intentionally and physically prevents a person from engaging in the protected activities of this Act; expressive conduct or speech that merely seeks to persuade such persons not to engage in such conduct does not constitute conduct which "interferes with" a person.

It cannot be guaranteed that these changes would render the Act, or all applications of the Act, constitutional. However, these changes would make it substantially more likely that the Act would be upheld. In addition, these changes would evidence an effort to legislate fairly arid within the bounds of the constitution. The failure to adopt these, or similar, amendments, would indicate that behind S. 636 is a desire to particularly target and punish prolife activists, disfavoring them in relation to abortion rights activists, and in effect a desire to chill the exercise of first amendment rights.

JOINT STATEMENT OF MICHAEL STOKES PAULSEN AND MICHAEL W. MCCONNELL

We would like to thank the committee for inviting us to give written testimony to this committee with respect to the constitutionality, under the first amendment to the U.S. Constitution, of S. 636, the "Freedom of Access to Clinic Entrances Act of 1993."

Professor Paulsen is an associate professor of law at the University of Minnesota Law School, where he specializes in civil procedure and constitutional law. Prior to becoming a law professor, he represented numerous parties and organizations on first amendment issues, including questions concerning the scope of first amendment protection for various antiabortion protest and advocacy activities at or near abortion clinics—the same issues that are the subject of S. 636. He has represented parties with opposite positions on the question of the propriety of abortion, including, for example, a local chapter of the American Civil Liberties Union and a chapter of National Right to Life. These organizations differ dramatically in their views on abortion, but they have agreed in the past on the importance of protecting first amendment rights with respect to advocacy on this important issue, regardless of whether they agree with the position being advocated.

Professor McConnell is the William B. Graham Professor of Law at the University of Chicago Law School, where he specializes in constitutional law. He has published more than 20 articles on various elements of first amendment law and has argued 8 cases before the United States Supreme Court, as well as constitutional cases in lower courts, principally on first amendment questions touching religious freedom and religious speech. His clients have included such diverse and antagonistic enti-

ties as Jimmy Swaggart Ministries and the International Society for Krishna Consciousness.

As amicus curiae he has represented religious and civil liberties organizations ranging from the National Association of Evangelicals and the Rutherford Institute to Americans United for Separation of Church and State and the American Jewish Congress.

INTRODUCTION

This is not the first time in this Nation's history that street demonstrations, sit-ins, and civil disobedience have been in the forefront of political activity on a particular issue, nor is this the first time that these activities have crossed the line into unlawful or even violent protest. The abolitionist movement, the labor movement, women's suffrage, the various antiwar protests, the civil rights movement, and many others have made themselves heard by picketing, blockades, street marches, and sit-ins, many of which obstructed the lawful right of other citizens to go about their business and many of which were intended to persuade, embarrass, or intimidate other citizens into taking action in support of the cause. We have thus been forced, as a nation, to decide how to deal with these protests.

We wish to note four principles that have guided the nation in the past and that should guide us in the matter of abortion clinic protests today. First, no one is entitled to violate the rights of others by trespass, assault, violence, or threat of violence, merely because they are acting in pursuit of a cause that may be just. Thus, some punishment is in order for abortion protestors who violate the law. Second, punishments must be narrowly tailored so that only those who have committed unlawful acts are punished, and only for the unlawful acts themselves. Statutes must be both drafted and enforced in such a way as to distinguish clearly between lawful and unlawful expressive conduct. Third, the punishment must be proportionate; a participant in a nonviolent sit-in for a political cause should not be treated as a hardened criminal; an excessive punishment betrays a hostility toward the protest. Fourth, no particular cause or point of view should be singled out: if a Klansman is fined $100 for trespassing on the property of a local civil rights organization, a freedom rider should be fined $100 (not less, not more) for the same sort of trespass on the property of a discriminatory merchant. If antinuclear protestors are let off with a slap on the wrist, antifluoridation protestors should be treated the same way. The great virtue of relying on general rules of tort and criminal law, rather than targeting each form of protest with a separate statute, is that tort and criminal law apply indiscriminately to all conduct of the same nature.

The proposed Federal Access to Clinic Entrances Act, S. 636, should therefore be of grave concern to those who value our heritage of fair play toward political protests.[1] To our knowledge, this would be the first statute designed to regulate political protests of one movement only. It is explicitly and unabashedly selective. It imposes severe sanctions on a demonstrator at an abortion clinic without imposing any sanction on an otherwise identical demonstrator at a research hospital engaged in animal experimentation or at a nuclear power plant. Moreover, it is excessive. It would throw participants in a peaceful sit-in demonstration in prison for one year (three years if they do it twice). A concerned citizen might go to a clinic one Saturday morning and peacefully sit on the steps with posters to dramatize the enormity of the evil she perceives therein—and spend the next year of her life in jail. Constitutional questions aside, members of Congress should think deeply about the injustice of imposing so severe a sanction on a person who has acted peacefully and out of conscience. Finally, the statute is not confined to violent—or even to unlawful—acts, but could be enforced against ordinary protestors who get in the way of an abortion clinic patron and whose message of moral condemnation the patron finds intimidating. And because the penalties are so severe and the definitions so indistinct, the free speech rights of the entire pro-life protest movement will surely be chilled. The vast majority of abortion protests are conducted nonviolently, within the bounds of the law, but even these peaceful protestors will face the 'real prospect of legal harassment by their ideological opponents.

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[1] We are concerned about other provisions of the bill, especially section 2715(d), which requires a Federal Government investigation of uncertain dimensions into pro-life activity on the request of an abortion provider, and section 2715(e)(1)(B), which forces pro-life protestors to pay sums of money to abortion clinics (beyond mere compensation for damages inflicted), which may violate the principles of Abood v. Detroit Board of Education, 431 U.S. 209 (1977). In this testimony, we concentrate on the constitutionality of the substantive prohibitions contained in the legislation.

The constitutional right to protest against abortion—forcefully and face-to-face, if necessary—no less important than the constitutional right to abortion.[2] Those who seek abortions have no constitutional right to be spared the indignity and distress of learning that many of their fellow citizens consider the act of abortion tantamount to murder. Thus, we urge this committee to put aside any opinions they might have, one way or another, on the abortion question, and ask: is this the sort of legislation I could support, consistently with the first amendment, if it applied to all political protests, including those with which I profoundly agree?

We note that the testimony in support of the constitutionality of this legislation was presented by witnesses who strongly support abortion rights. We doubt that anyone not sharing that conviction would be so confident of their assessment of this bill. All too often, it seems that legal scholars' and politicians' appraisal of constitutional issues—even of freedom of speech—is influenced by their views on the underlying substantive question.[3] We have tried to be aware of that possibility in ourselves: in the interest of full disclosure, we feel that the committee should be aware that both of us favor reasonable restrictions on the practice of abortion (though we do not approve of all the tactics or objectives of the pro-life protest movement). We believe, however, that the legal position we present here is the one we would take in the case of protests that espouse views we detest as well as those espousing views with which we are to some extent in sympathy. What animates us in this matter is the conviction that protecting the first amendment rights of those we oppose is vitally important to protecting the first amendment rights of everyone.

ANALYSIS

There are two main constitutional problems with S. 636 as currently drafted. First, the terms of S. 636's prohibition are unconstitutionally vague and overbroad, abridging a great deal of constitutionally protected expression. This overbreadth is substantial and, in our opinion, renders the entire bill unconstitutional on its face. This defect can be remedied only by making substantial changes in the bill's wording. Second, even that part of the bill that reaches constitutionally proscribable conduct (rather than protected expression) raises grave constitutional concerns in that it appears targeted at such conduct because of the viewpoint with which it is associated—the antiabortion viewpoint. Such a content-based or viewpoint-based punishment of civil disobedience, even if directed only at unlawful conduct in connection with such demonstrations, violates the first amendment under the Supreme Court's ruling last Term in R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992). Again, this constitutional flaw can be remedied, but not without fairly major changes in the bill as drafted. We will describe and develop each of these constitutional defects in turn.

(1) Vagueness and Overbreadth

S. 636 suffers from the first amendment problems of vagueness and overbreadth. The two concepts are related, but distinct. A statute is unconstitutionally vague where its terms are "so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application . . . ." Zwickler v.

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[2] Thus, we must respectfully disagree with Attorney General Reno's approach to S. 636, which dismisses the bill's effects on free expression as less important than the policy of protecting abortion: "The bill . . . is an effort to protect individuals in the exercise of their right to choose an abortion and to eliminate the harmful effect on interstate commerce resulting from interference with the exercise of that right. That justification is surely sufficient to override any incidental effect that the bill may have on expression." Testimony of Attorney General Janet Reno on S. 636, May 12, 1993, at 19.

[3] Unfortunately, this sometimes results in first amendment problems with proposed legislation being overlooked for reasons of political convenience or expediency. A recent example is Congress's enactment of the Flag Protection Act of 1989, 103 Stat. 777, 18 U.S.C. §700 (Supp. 1990), in an attempt to circumvent the Supreme Court's first amendment decision in Texas v. Johnson, 109 S. Ct. 2533 (1989), invalidating a state law prohibiting flag-burning. The Department of Justice, among others, testified that the proposed statute was plainly unconstitutional under Texas v. Johnson, and that a constitutional amendment was needed if flag-burning were to be prohibited. Hearings on Measures to Protect the Physical Integrity of the American Flag: Hearings Before the Committee on the Judiciary, United States Senate, 101st Cong., 1st Sess. 69 (1990) (testimony of William P. Barr, Assistant Attorney General, Office of Legal Counsel). The Supreme Court subsequently declared the Flag Protection Act unconstitutional for much the same reasons advanced by the Department in the congressional hearings. See United States v. Eichman, 110 S. Ct. 2404 (1990). At the time, however, Congress had been assured by some legal scholars (similar to the assurances that have been offered concerning S. 636) that a flag protection statute would be entirely constitutional. See, e.g., Hearings on Measures to Protect the Physical Integrity of the American Flag, supra at 148 (testimony of Laurence H. Tribe before the Senate Judiciary Committee Regarding Statutory and Constitutional Responses to the Supreme Court decision in Texas v. Johnson).

Koota, 389 U.S. 241, 249 (1967) (original quotation marks omitted). As the Supreme Court has repeatedly made clear, an especially stringent vagueness standard must be applied to laws that touch on first amendment freedoms. Village of Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 499 (1982); Grayned v. City of Rockford, 408 U.S. 102, 108–110 (1972). The vice of vagueness in the first amendment context is that, because an individual cannot be certain whether or not his conduct is prohibited by the statute, the vagueness of the statute exerts a powerful chilling effect on a wide range of protected first amendment activity. "[P]ersons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression." Gooding v. Wilson, 405 U.S. 518, 521 (1972). The first amendment does not tolerate statutes that exert such a deterrent effect on expression.

Whether or not a statute is vague, a statute is unconstitutionally overbroad where it "sweep[s] unnecessarily broadly and thereby invade[s] the area of protected freedoms." Zwickler, 389 U.S. at 250. Obviously, the more vague a statute's language, the more susceptible it is to a construction that sweeps unnecessarily broadly and thereby regulates constitutionally protected first amendment activity. Thus, while a statute can be overbroad even if it is clear (the statute may clearly reach too broadly and invade the realm of first amendment rights), overbreadth is often found in combination with vagueness. See, e.g., Houston v. Hill, 482 U.S. 451 (1987). S. 636 contains both types of problems.

S. 636 would impose, as a matter of Federal law, severe criminal and civil penalties on any person or group who "by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons, from (A) obtaining abortion services; or (B) lawfully aiding another person to obtain abortion services." Section 3, new section 2715(a)(1). The bill would impose the same penalties on any person or group who "intentionally damages or destroys the property of a medical facility or in which a medical facility is located, or attempts to do so, because such facility provides abortion services[.]" Section 3, new section 2715(a)(2).

Although this language has been described by supporters as narrow and precise, in fact its plain meaning extends beyond the conduct that its sponsors claim to be concerned about proscribing.[4] Subsection (a)(1) applies whenever certain action is taken "by force or threat of force or by physical obstruction." Such action is prohibited when it "intentionally injures, intimidates or interferes with" (or attempts to injure, intimidate or interfere with) "any other person or class of persons" because that person is seeking to obtain, or assist another in obtaining, an abortion. A violation thus may be established by showing that a person has "by physical obstruction intimidate[d] or interfere[d] with" a person seeking to obtain or assist another in obtaining an abortion.

This language certainly goes beyond the "terrorists" who figure so prominently in rhetoric in support of the bill. It obviously can extend to peaceful, nonviolent civil disobedience, such as sit-ins and prayer vigils on clinic property, and—unless the language is narrowed—appears to proscribe such constitutionally protected conduct as sidewalk counseling or picketing, which could be said to "obstruct" passage to the clinic. We do not contend that the terms "force or threat of force," "injure," or "damage or destroy the property" are vague or overbroad. The problem is with the terms "physically obstruct" and "intimidate or interfere." Since the statute requires both elements—the conduct must both "physically obstruct" and "intimidate or interfere"—it is unconstitutional on its face if either of these terms is unconstitutionally vague or overbroad.

a. The terms "obstruction", "intimidates", and "interferes with" are, in context, imprecise and unconstitutionally overbroad, they could be construed to include much entirely lawful conduct. Taken literally, one may "obstruct" another by merely hindering or impeding that person's progress or activity—in short, by being in a person's way. In the context of common antiabortion expression at abortion facilities, such an understanding of "obstruct" might be taken to describe a sidewalk counselor

[4] We note that S. 636 is not limited in its application to conduct that takes place at or near the premises of abortion facilities. Thus, the prohibitions of the bill may well apply within the home, to parents who "intimidate" or physically prevent their minor daughter from obtaining an abortion. In addition, S. 636 is not limited in its application to interferences with persons who are seeking lawful abortion services. As written, the bill appears to make it a Federal crime to attempt to enforce state laws (of unquestioned constitutional validity) that prohibit abortions of viable fetuses or that prohibit minors from obtaining abortions without parental notice. The bill's language thus gives rise to some no doubt unintended consequences quite aside from those that create first amendment vagueness problems.

who steps in front of a pregnant woman to hand her a leaflet, or who seeks personally to dissuade her from aborting her child, or to a picket line which such a woman must cross in order to enter the abortion facility. Such conduct may well physically hinder or impede a woman from obtaining an abortion in the sense of slowing her progress to the abortion clinic door (but without actually preventing such access).

These examples highlight the vagueness of S. 636. A pro-life picketer or leaf letter must necessarily guess at the meaning and application of the bill with respect to various conduct in connection with first amendment expression. See Zwickler v. Koota, 389 U.S. at 249.[5] This problem is of course multiplied by the sheer enormity of the penalties attached to guessing wrongly—up to a year in prison for a single violation and three years for second or subsequent violations, to say nothing of civil remedies and attorneys fees. Moreover, if each person obstructed constitutes a separate offense, the amount of possible prison time becomes a function of the number of complaining abortion clinic patrons and employees.[6] Given that a violation could consist of entirely peaceful protest activity (and, except for the prohibitions of this bill, entirely lawful activity), the chilling effect on protected speech of the threat of such disproportionately severe penalties cannot be understated. If ever there were a case where "persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression," Gooding v. Wilson, 405 U.S. at 521, S. 636 is such a statute.

Such expressive conduct as picketing, leaf letting, and sidewalk counseling is, of course, plainly protected by the first amendment. It therefore may not be restricted—let alone subjected to the threat of enormous civil and criminal liability—on the basis that it might annoy or inconvenience the hearer. As the Supreme Court has repeated: "'Speech is often provocative and challenging. . . . [But it] is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.'" Houston v. Hill, 482 U.S. 451, 461 (1987) (quoting Terminiello v. Chicago, 337 U.S. 1, 4 (1949). "Speech does not lose its protected character simply because it may embarrass others or coerce them into action." NAACP v. Claiborne Hardware Co., 458 U.S. 886, 910 (1982). Accord Spence v. Washington, 418 U.S. 405 (1974) ("It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of the hearers.") (citations and quotation marks omitted). See, e.g., State v. Schneider, 308 U.S. 147 (1939); Cantwell v. Connecticut, 310 U.S. 296 (1940); Mississippi Women's Medical Clinic v. McMillan, 866 F.2d 788, 791 (5th Cir. 1989). So long as persons are free to walk through the picket line, reject or throw away a leaflet, or walk around or past a sidewalk counselor, the minor inconvenience or annoyance that may be caused by such "obstructions" must be tolerated as part of the constitutional protection of free expression.

This is not to say that the first amendment grants a right to block free ingress and egress to and from a facility open to the public. It does not. See Cameron v. Johnson, 390 U.S. 611 (1968). Rather, it is to say that the first amendment requires great precision of regulation in this area. See, e.g., Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982). As the U.S. Court of Appeals for the Fifth Circuit held in a case involving a state law regulating protests by farm workers, to be constitutional the term "obstruction" must be defined or narrowed so that it does not include "mere momentary interferences which are so temporary and incidental that they do not constitute imminent threats of violence or public disorder." Howard Gault Co. v. Texas Rural Legal Aid, Inc., 848 F.2d 544, 559 (5th Cir. 1988). In that case, the court was able to save the constitutionality of the statute by incorporating a definition of "obstruction" from elsewhere in the

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[5] Attorney General Reno stated in her testimony to this committee that "[m]en and women of common intelligence will have little difficulty discerning what conduct [S. 636] prohibits." Reno Testimony, at 20. But when asked about application of the bill to certain specified actions, Attorney General Reno generally refused to answer, deferring such questions to the courts or stating that it was impossible to answer hypotheticals with precision. But if the Attorney General of the United States can offer no guidance as to the understanding of the key terms of the statute, how can we expect a sidewalk counselor—on pain of penalty of up to 3 years in prison—to be certain that she understands them correctly?

[6] In her testimony before this committee, Attorney General Reno advocated that "the enhanced penalty for 'second and subsequent offenses' be made applicable even when the defendant has not been previous convicted of a prohibited activity." Reno Testimony, at 21. This would, of course, heighten the constitutional problems of the bill yet further, since it would be possible to violate this statute many times in a single morning. Thus, the sidewalk counselor or picketer trying to guess whether her speech is punishable or not would be risking not just one year in prison but three, for each "count" (after the first) arising from a single course of conduct.

state penal code: "the 'rendering impassible or the rendering unreasonably inconvenient or hazardous the free ingress and egress to the struck premises.'" Id., quoting Tex. Penal Code §42.03(b). Here, similarly, it is necessary either for Congress or the courts to narrow and define the term "obstruct" so that it does not include interferences that do not constitute imminent threats of violence or public disorder, such as leaf letting, picketing, or counseling.[7] To avoid constitutional infirmity, subsection (a)(1) should be amended to make clear that only those physical obstructions that actually prevent entrance to an abortion facility or make entrance unreasonably inconvenient or hazardous are unlawful.

b. Even more problematic from a constitutional standpoint is that "physical obstruction" becomes unlawful under S. 636 where it has the intent or effect of "intimidat[ing]" pregnant women from aborting their pregnancies or of "intimidating" others from performing or assisting others in procuring abortions. A prohibition on expressive conduct because of its "intimidating" effect proscribes a substantial amount of constitutionally protected speech solely because of its persuasive impact, in plain violation of the first amendment and numerous Supreme Court precedents.

The word "intimidating" in S. 636 would unconstitutionally permit a violation to be based on the subjective reaction of abortion clinic patrons and personnel to anti-abortion speech. A person may well feel "intimidated" by being forced to confront the fact that others consider her conduct to be deeply immoral—"murder," in the eyes of many pro-life advocates. But no citizen has a right to insulate herself from the opinions of others, however traumatic or offensive those opinions may be to her. By making a violation turn on the sense of affront, embarrassment, annoyance, intimidation, or chagrin experienced by the pregnant woman who encounters pro-life pickets or sidewalk counselors as she is preparing to abort her fetus or unborn child, S. 636 is plainly unconstitutional.

On two occasions, the Supreme Court has struck down government action regulating or punishing expressive conduct on the ground that it was "intimidating." In Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971), the Supreme Court invalidated a lower court's injunction prohibiting allegedly "coercive and intimidating" (id. at 418) leaflets highly critical of an individual's business practices:

> [T]he Appellate Court was apparently of the view that petitioners' purpose in distributing their literature was not to inform the public, but to 'force' respondent to sign a no-solicitation agreement. The claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the first amendment . . . . Petitioners were engaged openly and vigorously in making the public aware of respondent's real estate practices. Those practices were offensive to them, as the views and practices of petitioners are no doubt offensive to others. But so long as the means are peaceful, the communication need not meet standards of acceptability.

Id. at 419.

This same passage was quoted by approval by the Court in NAACP v. Claiborne Hardware Co., 458 U.S. 882, 910–11 (1982). The Claiborne Hardware case is especially relevant to S. 636. At issue in that case was a highly "intimidating" civil rights protest and boycott, including many unlawful acts committed by supporters of the boycott. A civil rights organization organized a campaign, including marches and picketing, to encourage black citizens of a Mississippi county to boycott local white merchants. As the Court found, the boycott effort involved both constitutionally protected free speech activity and also unlawful violence. Shots were fired through the windows of blacks who resisted the boycott, threatening telephone calls were made, and an elderly preacher was stripped and beaten, among several other acts and threats of violence.

In Claiborne Hardware (as in proposed S. 636) parties opposed to the activities of the protestors sought legal relief—damages and injunctive relief—against the entire protest and not only against the unlawful acts and the persons responsible for such acts. The Supreme Court reversed the award of damages based on an undifferentiated mix of constitutionally protected speech and unprotected tortious acts

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[7] In Cameron v. Johnson, 390 U.S. 611, 612 (1968), the Supreme Court upheld on a facial challenge a statute that made it unlawful for any person to "engage in picketing or mass demonstrations in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from any public premises." The litigants in that case did not challenge the term "obstruct," but focused instead on the term "unreasonably." Id. at 616. As noted in the text, subsequent courts faced with a specific challenge to the vagueness and overbreadth of the term "obstruct" have felt it necessary to impose a narrowing construction. Howard Gault Co., 848 F.2d 544. It bears mention that in Cameron, the district court had found on evidence stipulated by the parties that the protestors had made entry to and exist from the courthouse "impossible." Cameron v. Johnson, 381 U.S. 741, 745 (1965) (Black, J., dissenting).

engaged in by some members of the protest, holding that only the latter could be prohibited. The Supreme Court specifically found protected by the first amendment a number of aggressive tactics employed by the protestors—tactics not dissimilar to those sometimes employed by pro-life protestors today and often characterized as "intimidating" or invasions of privacy by operators of abortion businesses:

> Nonparticipants repeatedly were urged to join the common cause, both through public address and through personal solicitation. These elements of the boycott involve speech in its most direct form. In addition, names of boycott violators were read aloud at meetings at the First Baptist Church and published in a local black newspaper. Petitioners admittedly sought to persuade others to join the boycott through social pressure and the "threat" of social ostracism. Speech does not lose its protected character, however, simply because it may embarrass others or coerce them into action.

Id. at 910. Significantly for purposes of S. 636, the Court specifically rejected the idea that speech could be restricted or punished because others were "intimidated":

> To the extent that the [lower] court's judgment rests on the ground that 'many' black citizens were 'intimidated' by 'threats' of 'social ostracism, vilification, and traduction.' it is flatly inconsistent with the first amendment.

Id. at 921.

Lower courts have reached similar conclusions. In one notable case, the U.S. Court of Appeals for the Ninth Circuit struck down on grounds of facial overbreadth a Montana statute defining the criminal offense of "Intimidation," including "intimidation" by threats to commit unlawful acts. Wurtz v. Risley, 719 F.2d 1438 (9th Cir. 1983). Citing Claiborne Hardware and Organization for a Better Austin's holdings that speech which coerces is not thereby less entitled to constitutional protection (719 F.2d at 1441), the court held that

> [t]he statutory language applies so broadly to threats of minor infractions, to threats not reasonably likely to induce a belief that they will be carried out, and to threats unrelated to any induced or threatened action, that a great deal of protected speech is brought within the statute.
>
> [S]peakers may refrain from delivering their constitutionally protected messages for fear of the statute's application . . . . It is that chilling effect that the first amendment forbids. We therefore conclude that . . . [the Montana statute] is void on its face for overbreadth.

Id. at 1442, 1443.

Our point is a simple one: While the state may punish actual assaults or physical interferences placing a person in reasonable apprehension of immediate bodily harm, a statute forbidding conduct of an "intimidating" nature sweeps far too broadly into the realm of protected first amendment expression.

c. Much the same type of objections as apply to the words "obstruction" and "intimidate" apply to the term "interferes with".

In Dorman v. Satti, 862 F.2d 432 (2d Cir. 1988), the U.S. Court of Appeals for the Second Circuit invalidated Connecticut's Hunter Harassment Act, which prohibited persons from "interfer[ing] with the lawful taking of wildlife by another person" (or preparations for the lawful taking of wildlife) or "harass[ing] another person who is engaged in the lawful taking of wildlife" (or preparations therefore). The statute was applied against a woman who "interfered" with several duck hunters by "sp[eaking] to them about the violence and cruelty of hunting." Id. at 434. The Court found the term "interfere" so vague and overbroad that it could not be cured even by a narrowing construction. It thus held the statute unconstitutional on its face. Id. at 436-43?. See also Houston v. Hill, 482 U.S. at 466.

d. The overbreadth of S. 636's language is substantial. In the context to which S. 636 is directed—antiabortion protests and civil disobedience at abortion clinics—the bill's language plainly reaches a significant amount of protected first amendment activity. A large number of the potential applications of such statutory language are likely to involve protected first amendment expression, like sidewalk counseling, direct person-to-person attempts at persuasion, and peaceful picketing. Given the extraordinary penalties and civil remedies available to punish violations, S. 636 would doubtless have a severe chilling effect on entirely lawful (indeed, constitutionally protected) pro-life speech and expression at abortion clinics. In this context, the substantial overbreadth of the bill's prohibition renders the entire bill unconstitutional. See Board of Airport Commissioners v. Jews for Jesus. Inc., 482 U.S. 569, 574 (1987); Houston v. Hill, 482 U.S. 451, 458–49 (1987); New York v. Ferber, 458 U.S. 747, 769 (1982).

We are aware that other Federal criminal statutes use some of the same language as is used in subsection (a)(1)'s prohibition, including forms of the word "intimidate". See, e.g., 18 U.S.C. §245(b) (prohibiting interference with right to vote, enjoy Federal benefits or employment, serve on Federal juries, etc.); 18 U.S.C. §594 (prohibiting intimidation or coercion for the purpose of interfering with the right to vote in Federal elections). 18 U.S.C. §112(b) (prohibiting intimidation, coercion, or harassment of foreign officials); 18 U.S.C. §372 (making it unlawful to "conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office "). In their testimony to the committee, Professor Tribe and Attorney General Reno placed considerable emphasis on such statutes in defending the approach of S. 636. We believe this reliance is misplaced, for two related reasons.

First, it is a logical mistake to rely on the mere existence of such statutes—the constitutionality of which as applied to speech activities generally has not been tested by the courts—as supporting the constitutionality of a bill using the same language. This begs the question-in-chief. It seems to us plain from the cases discussed above that some applications of these statutes would violate the first amendment. For example, neither 18 U.S.C. §245(b) nor 18 U.S.C. §594 could constitutionally be applied to punish otherwise lawful leaf letting at polling places, even if such leaf letting were thought to "intimidate" or "coerce" persons into not voting. Cf. Burson v. Freeman, 112 S. Ct. 1846, 1857 (1992)[8] Nor could 18 U.S.C. §112(b), which prohibits intimidation, coercion, or harassment of foreign officials, be applied to prohibit demonstrations directed at foreign embassies because of their emotional impact on foreign officials (so long as such demonstrations complied with ot9her lawful regulations). Boos v. Barry, 485 U.S. 312 (1987).[9] Clearly, then, not all applications of the statutes relied on by Professor Tribe and General Reno would be permissible under the first amendment. It is noteworthy that many of these statutes were enacted before the development of modern first amendment doctrine. It is therefore a serious mistake to rely uncritically on such "borrowed" statutory language, where the constitutionality of such language has not been tested as applied to expressive activity and where such attempted application would likely be struck down under applicable Supreme Court precedent (decided after the enactment of such statutory language) protecting intimidating or "coercive" speech. To borrow such statutory language is to borrow constitutional trouble.

The second reason why it may be improper to rely on such statutes has to do with the degree of unconstitutional overbreadth in such statutes in relation to their legitimate sweep. While some applications of these other Federal statutes would be unconstitutional, that does not mean that those statutes are unconstitutional on their face. Under the overbreadth doctrine, the entire statute is not unconstitutional unless the overbreadth is "substantial" in relation to the statute's legitimate objects of regulation. Jews for Jesus, 482 U.S. at 574; Houston v. Hill, 482 U.S. at 458–49; Boos v. Barry, 485 U.S. at 331; New York v. Ferber, 458 U.S. at 769. The situations to which these other Federal statutes are directed, and the contexts in which they are likely to be applied, are not as closely and directly associated with traditional first amendment activity like picketing and leaf letting on public sidewalks as is the prohibition of S. 636. It is therefore possible that these other statutes might be susceptible to a "saving construction" despite the apparent overbreadth of their language. See generally Boos v. Barry, 485 U.S. at 330–31; New York v. Ferber, 458 U.S. 747, 769 n.24 (1982).

The simple point here is that S. 636 embraces a substantial amount of constitutionally protected conduct with relation to its sweep, in a way that these other statutes may well not. In none of these other instances is the principal application of the statute to the situation of protests or acts of civil disobedience. Those statutes might sometimes apply to protests, but S. 636 is about protests. The proposed bill is specifically and exclusively concerned with protecting abortion businesses and their patrons from antiabortion protest activity. Unlike other statutes employing similar language, the very object of S. 636's regulation touches closely on first amendment freedoms.

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[8] In Burson, a plurality of justices upheld a statute banning election day leaf letting and campaigning within 100 feet of the polls, because of the state's long-standing, traditional interests in preventing voter intimidation and election fraud. Id. at 1851–56 (plurality opinion). Unlike S. 636, the statute upheld in Burson did not ban "intimidating" speech but all political speech within a certain radius—avoiding the vagueness and overbreadth problems of S. 636 by adopting a more categorical restriction. There is no majority opinion in Burson and nothing even within the plurality opinion that in any way impairs the authority of Organization for a Better Austin or Claiborne Hardware in this regard.

[9] Indeed, 18 U.S.C. §112(b) was upheld against constitutional challenge only after it had been given an authoritative narrowing construction that removed peaceful picketing from its ambit. Committee in Solidarity v. FBI, 770 F.2d 468, 474 (5th Cir. 1985).

We wish to be clear, however, that we are not defending the use of such overbroad language in these other statutes. In our view, the better course would be for Congress to revise the language of such statutes to conform with the evolution of first amendment doctrine over the past several decades. All that we are saying is that, because the overbreadth of these other statutes may not be "substantial", the courts might save Congress from some of the consequences of its poor use of language in the past, by giving the statute a narrowing construction. But that "safety valve" is not available with respect to S. 636 because its language reaches a truly substantial amount of constitutionally protected conduct.

e. Under the heading of "rules of construction", new §2715(f)(5) provides that "[n]othing in this section shall be construed or interpreted to . . . prohibit expression protected by the first amendment to the Constitution." New §2715(f)(5). It should almost go without saying that this statement is legally gratuitous: Congress has no power to prohibit expression protected by the first amendment. Committee in Solidarity v. FBI, 770 F.2d 468, 474 (5th Cir. 1985). More importantly, however, such a savings provision does nothing to save the statute from vagueness or overbreadth problems: it does not define more precisely the terms being used, nor does it narrow the scope of unconstitutional applications of the statute. Indeed, S. 636 omits language contained in the House version of the bill which, while still insufficient, at least makes clear that certain expressive activity is not sought to be regulated. H.R. 796, as marked-up in committee, provides that "[t]his section does not prohibit (1) any expressive conduct, including peaceful pickets or peaceful protests, protected by the [first amendment]," H.R. 796, §2, new section 248(d)(1). At a minimum, even this language should be revised to make clear that the prohibitions of the bill are intended only to reach conduct that is independently unlawful and that the bill does not purport render unlawful any expressive conduct that would otherwise—that is, but for S. 636—be lawful.

(2) Targeting of Pro-Life Expression and Activity

The most fundamental premise of first amendment law is that government may not penalize speech or conduct on the basis of its content or viewpoint. Last year, in the case of R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992), the Supreme Court made clear that this principle applies even to government regulation of the unprotected aspects of expression: government may not regulate even unprotected speech or conduct out of hostility to the views being expressed by such conduct.

The second major constitutional problem with S. 636 concerns this principle of discriminatory treatment of certain expressive conduct because of its content or viewpoint. The bill's plain purpose and essential feature is to prohibit and punish as unlawful certain conduct—conduct that commonly occurs in political protests of various sorts—in connection with antiabortion protests.

The ostensible goal of S. 636 (though, as discussed above, not the effect of S. 636 as presently drafted) is to prohibit only that conduct which lies outside the scope of first amendment protection for expressive activity. This general objective is completely unexceptionable from a first amendment standpoint. Virtually by definition, a law regulating only conduct that is unprotected by the first amendment does not present constitutional difficulties of the same order as a law directly regulating speech or expression. Nonetheless, the first amendment prohibits Congress from regulating even unprotected conduct when it seeks to do so because of the viewpoint sought to be expressed by that conduct or because of its connection with the lawful expression of views on a certain topic (e.g., abortion). As the Court stated in R.A.V. v. City of St. Paul, "nonverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses." 112 S. Ct. at 2544. Under R.A.V., government may not regulate even "unprotected features" of expression (such as conduct that is unlawful regardless of any expressive component) "based on hostility . . . towards the underlying message expressed." Id. at 2545. Government may regulate such conduct, but its ability to do so selectively is limited: it may do so only "so long as the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot." Id. at 2547.

S. 636, as presently drafted, presents a difficult constitutional issue under this test—much more difficult and subtle than the facile analysis of Professor Tribe would lead one to believe. The House version of the bill, H.R. 796, is plainly unconstitutional under R.A.V. That bill would prohibit blocking access to abortion clinic entrances "with intent to prevent or discourage any person from obtaining [abortions]". H.R. 796, section 2, new section 248. Such a prohibition regulates certain civil disobedience activity explicitly on the basis of the views or ideas expressed thereby—an obvious first amendment violation under R.A.V. 112 S.Ct. at 2543–45. S. 636 is more artfully drafted. It defines a violation not in terms of the ideas being expressed by the protest or civil disobedience (as does the House bill) but in terms

of the effect of such acts on persons engaged in the conduct (abortion) against which the protest or civil disobedience is directed, or the premises at which such conduct (abortion) takes place.

Professor Tribe's analysis suggests that these verbal circumlocutions make all the constitutional difference in the world. The problem of S. 636's selectivity is not so easily dismissed. Tribe is correct only to the extent that S. 636's verbal circumlocution makes the constitutional infirmity of the Senate version far less obvious than that of the House version, because the words of S. 636's prohibition themselves, considered in isolation, do not necessarily indicate an intention to regulate antiabortion civil disobedience out of hostility to the ideas being expressed. Nonetheless, there are a number of things about the context surrounding the consideration of S. 636 that might well lead a court to conclude (and that should certainly lead Senators concerned with their own constitutional obligations to conclude) that S. 636 is targeted at antiabortion expressive activity because of its antiabortion message—that there is at least a "realistic possibility that official suppression of ideas is afoot." R.A.V., 112 S. Ct. at 2547.

First, the fact that the House bill, which bears the same title and is addressed to the same purposes as S. 636, overtly targets antiabortion activity on the basis of its expressive purposes, reveals something about the purpose of S. 636 as well. The two bills are different versions of the same basic legislation. While it would be unfair to tarnish the Senate's language with the errors of the House, it would also be naive to pretend that the same animus against pro-life civil disobedience reflected in the House bill does not in any way infect the Senate bill. It is entirely possible that a court would regard the verbal circumlocution of S. 636 as designed to accomplish the same antiexpressive purpose as the House version, and accordingly strike it down as merely a clever attempt to violate the first amendment in a roundabout, rather than direct, manner.

Second, the context of S. 636 suggests that its drafters and supporters were not legislating neutrally with respect to the protection of constitutional rights or the excesses of political protests, but were singling out and discriminating against a particular unpopular political movement. How would one test such a thesis? We propose that one should look at two questions: (1) does the statute impose more severe sanctions on violations committed by those involved in a particular political movement than the law imposes on similar violations committed by those involved in other causes; and (2) does the statute provide protections for private violations of the constitutional rights of both sides in the abortion controversy, or only one?

Both questions answer themselves. Abortion protestors are not the only political protestors to obstruct others in an attempt to intimidate or prevent them from exercising their legal rights, but they would be the only ones singled out for special punishments as a matter of Federal law. Persons protesting animal research at universities or research facilities are not subject to such penalties. Gay rights protestors who unlawfully interfere with church services also are not covered by S. 636. Nor does the bill apply to civil disobedience directed at other types of facilities that may involve Federal interests, such as antiwar demonstrations at military installations, antinuclear sit-ins at nuclear power plants, or blockades of campus placement offices to protest recruiting visits by representatives of the nation's armed forces or intelligence services. In short, the bill is not concerned with controlling unlawful civil disobedience at any of several types of places where there is a Federal interest in preserving rights of access, but only with punishing civil disobedience whose intent or effect is to prevent or discourage abortion. If the drafters of this legislation were genuinely concerned about the effects of unlawful political protest tactics in general, they would broaden the statute to encompass all such instances of unlawful protest that interferes with the rights of others, irrespective of the object of the protest.

In light of the failure of the bill to treat unlawful protests generally, it is difficult to avoid the impression that the bill is targeted at antiabortion activity. The fact that the proposed bill applies to abortion protests (and only incidentally anything else) suggests that its drafters disapprove more strongly of unlawful protests against some conduct than against other, or feel greater sympathy with some political protestors than with others. How many of the bill's supporters would vote for Federal legislation throwing any person in jail for an entire year who on one occasion "obstructs" a military recruitment office with the intention of "intimidating" potential recruits from exercising their right to sign up for military service? Or for similar sanctions against protestors who "obstruct" the South African embassy with the intention of "intimidating" anyone who wishes to do business with the apartheid regime?

It is said that this bill is needed to solve a great public problem, but as the Court noted in R.A.V., "[a]n ordinance not limited to the favored topics . . . would have precisely the same beneficial effect." 112 S. Ct. at 2550. Indeed, to the extent that

proponents of S. 636 assert that the interests justifying the bill are "important or substantial" ones unrelated to the suppression of free expression, Tribe testimony at 18 (quoting United States v. O'Brien, 391 U.S. 367, 376–77 (1968)); Reno testimony at 17, the failure to pursue that "important" interest where it arises in other contexts tends to belie the assertion that it really is unrelated to the suppression of expression. As one respected first amendment scholar has noted, such an "overnarrow" statute "may be said to create a conclusive presumption that in fact the state interest which the statute serves is an anti-[speech] rather than a nonspeech interest." M. Nimmer, Freedom of Speech: A Treatise on the Theory of the first amendment, §2.06[B] at 2–94 (1984). Cf. Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S. 575, 582 (1983) (invalidating tax statute under first amendment because it "singled out the press for special treatment.").

The second question is whether the proposed bill protects the constitutional rights of both sides in the abortion controversy from violations by private persons. Again, the answer is "no." These hearings have shown (and far more evidence could be supplied, if the committee is interested) that lawful pro-life demonstrators often are assaulted by pro-choice activists and mistreated by local law enforcement authorities—in violation of their civil rights. If the drafters of this legislation were concerned about constitutional violations in the abortion context, they would provide redress against these unlawful acts, no less than against the unlawful acts of antiabortion protestors. The one-sidedness of the proposed bill strongly suggests that it is an instrument of partisanship—of strong preference for one side in this rancorous public debate. The cure for this constitutional defect is again to broaden the bill, to provide that whoever by force or threat of force injures or prevents the exercise of first amendment rights of expression by persons engaged in lawful antiabortion counseling or picketing shall be subject to the same criminal and civil penalties as are provided for acts directed against the exercise of abortion rights.[10]

In sum, the constitutional problems presented by S. 636's selectivity could and should be remedied by broadening the scope of the prohibition to include unlawful acts committed in the course of protests that interfere with federally protected rights or interests other than abortion, such as military installations or federally funded animal research facilities (that is,, regardless of the subject matter that is the focus of the protestor's unlawful conduct) and to include also unlawful acts committed by persons regardless of which side of the abortion controversy they are on (that is, regardless of the viewpoint with respect to abortion of the person engaged in the unlawful activity).

Such changes, in addition to those noted above with respect to the overbreadth of the bill's language, would go a long way toward resolving the difficult first amendment issues presented by the bill as presently drafted. The point of broadening the prohibition is to ensure—and to establish—that Congress is not acting out of special hostility to antiabortion demonstrations, but out of a legitimate regulatory concern that it is prepared to apply across-the-board to all forms of protest activity and all points of view. As Justice Robert Jackson so eloquently put it in his celebrated opinion in Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949):

> The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.

Id. at 112–13 (Jackson, J., concurring). S. 636 is a classic illustration of Justice Jackson's point. We submit that if this bill applied to all forms of protest equally, it probably would never pass, because Congress would then be forced to confront the concerted outrage of civil rights protestors, labor pickets, animal rights protests, antinuclear protestors, gay rights protestors, and numerous others. It is only by confining the strictures of this bill to one particular movement that is currently detested by many in Congress that it could be seriously considered. That is the reason the first amendment insists that Congress legislate in broader, general terms: so

[10] The bill's ambiguous terms make it possible to construe the prohibitions of subsection (a)(1) to include acts of force that intimidate or interfere with antiabortion counseling (including sidewalk counseling), since any "counselling or referral services relating to the termination of a pregnancy" falls within the definition of "abortion services" under subsection (g)(1). We doubt that such a construction was intended. If it was, the point certainly should be made clear.

that Congress is not able to single out particular causes and, through artful drafting, subject their protests to extreme and unpredictable sanctions that are not applied to similar protests of less unpopular causes.

It is impossible to say with certainty whether or not such factors would lead a court to find S. 636 unconstitutional on content-discrimination grounds. We would tend to distrust any opinion that represented this issue as obvious, one way or the other. There is no precedent clearly on point. The standards we employ for determining content-neutrality by context might be deemed nonjusticiable. The judiciary is commendably reluctant to attribute to Congress the intention to use its power to favor one side in a political struggle, and inclined to defer to Congress in a close case. Thus, this part of our testimony should not be interpreted as a prediction about what the courts will do; neither we nor anyone else can be sure about that. Instead, it is a brief to the first constitutional authority that must consider this issue, the Congress itself, whose obligation to enforce the first amendment is as clear as that of the courts and whose ability to discern the purposes and effects of legislation is free of the necessities of deference to a coordinate branch. No Member of Congress should vote for this legislation unless he or she can affirm that it is unaffected by hostility toward the aims of the pro-life movement—unless he or she would be willing to vote for the same legislation if it applied to a movement he or she cherished and supported. So severe and sweeping is this legislation that we do not think that is possible.

CONCLUSION

The right to choose abortion created by the Supreme Court in Roe v. Wade, 410 U.S. 113 (1973) is in its essence a decisional right—a right to be free from excessive governmental restriction on the choice whether to have an abortion. It is not a right to be free from hearing the sometimes strident advocacy of private persons who believe that that choice should be exercised in favor of the life of the unborn child. For as long as Roe remains the law, those that believe that abortion is unjust have no recourse—no way of trying to stop abortions—except through trying to inform and persuade persons who are considering having an abortion. The sweeping and overbroad terms of S. 636 would impose severe punishments, and create an enormous chilling effect, on entirely lawful public advocacy. It targets antiabortion protests and civil disobedience for unique punishments. In our view, the bill as currently drafted is plainly unconstitutional.

It may be said that the excesses and selective punishments imposed by this bill are necessary lest the illegal acts that sometimes occur in abortion protests be undeterred. But as the Supreme Court has wisely stated: "[I]f some constitutionally unprotected speech must go unpunished, that is a price worth paying to preserve the vitality of the first amendment. ¶[I]f absolute assurance of tranquility is required, we may as well forget about free speech. Under such a requirement, the only 'free' speech would consist of platitudes. That kind of speech does not need constitutional protection.'" Houston v. Hill, 482 U.S. 451, 462 n.11 (1987) (Brennan, J.), quoting Spence v. Washington, 418 U.S. 405, 416 (1974) (Douglas, J., concurring).

Much of the above analysis has consisted of principles of first amendment law set forth in Supreme Court precedents. But it would be a mistake to think that all constitutional law begins and ends with Supreme Court decisions. In this case, protection of first amendment values begins with the Congress and with this committee. Each constitutional officer who swears an oath to support the Constitution, as Article VI of the Constitution prescribes for all Senators and Representatives, has an independent constitutional duty and responsibility to assure that no law is enacted with violates that Constitution. In our view, that responsibility goes beyond merely predicting what the courts would hold—for that would be merely recognizing that the courts also have a responsibility to the Constitution—but entails as well an affirmative duty to go beyond court rulings in declining to support any legislation where the individual senator or representative, on the basis of his or her own understanding of the Constitution, is not fully persuaded as to its constitutionality. After all, the text of the first amendment begins with the command that "Congress shall make no law abridging the freedom of speech." As President Andrew Jackson once put it: "The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others."

We commend this committee's seriousness of purpose in considering the important constitutional issues presented by legislation such as S. 636 and again thank the committee for the opportunity to present our views. We urge the members of the committee to look beyond the politics of the moment and to resolve all doubts about

the constitutionality of this bill in favor of vigilant protection of first amendment rights.

JOINT STATEMENT OF CURTIS BOYD AND LISA GERARD

The Fairmount Center is a private abortion clinic owned by Curtis Boyd, M.D. and Glenna Halvorson-Boyd. The clinic has been in operation since February 1973 and was the first freestanding abortion clinic to open in Texas. The Boyds and the Fairmount Center are well known for pioneering work in the field of abortion care. This document is intended to describe the harassment the center has experienced over the past several years.

A marked increase in the amount and intensity of antiabortion activity began on October 29, 1988. This was the date of the first "rescue" staged at this center by Operation Rescue. On that date about 200 protestors blocked our entrances and 27 were arrested. Since then, "rescues" have been held on a regular basis at Dallas clinics and our clinic has been targeted several times. Two "rescues" in particular (December 2, 1989 and January 27, 1990) stand out in our memories. On both occasions we had about 400 protestors and it took the Dallas police over 2 hours to clear our doors. This created very dangerous situations as people could not get out of the building, much less get inside. On January 27, 1990 several protestors stormed the doors. Two got inside and knocked a physician and counselor to the ground in their haste to get back to our surgery rooms. They chained themselves together and the police had to cut through the chains in order to remove the protestors from the building.

"Rescue" continues to be a problem in Dallas. Although more recent events have yielded fewer protestors, it really does not take that many to blockade the doors and make entry or exit impossible. We have been fortunate in Dallas to have good support from the police but the difficulty in prosecuting the offenders, even when they do get arrested, makes their removal slow and tedious during a rescue. We must give an individual trespass warning to each offender and each warning must be videotaped. Even with all of this many get off on some sort of technicality when the cases go to court or they receive a minimal fine. The result is the same offenders are arrested over and over again. There is really no deterrent to arrest.

On December 24, 1988 our clinic was the target of an arsonist. A large part of our building was destroyed. Two other Dallas clinics were set on fire on this same date. All of the fires began within a few minutes of each other so clearly more than one person was involved. One cannot help but think the arrival of Operation Rescue a few months prior encouraged hatred and contributed to these incidents.

A particularly serious problem occurred during one "rescue". A patient with very limited English speaking ability arrived for her second appointment at the clinic. She had been seen the previous day when dilators were inserted to slowly open the cervix for her abortion the following day. She was instructed, as all patients are, about the urgency of keeping her second appointment because infection, pain, bleeding or other problems can occur if the dilators are not removed.

When the patient arrived she was surrounded by protestors who told her the clinic was closed and they would take her to another doctor. Frightened, she went with them and saw a physician who removed all but one of the dilators and told her she could continue the pregnancy! Our staff was quite alarmed when this patient did not show up for her appointment. We made several unsuccessful attempts to call her and then sent a Spanish speaking counselor to her address. The patient was not there, but a message was left for her. She called and told us what had happened. She came into the clinic and was able to have her pregnancy terminated. This situation was potentially life-threatening for the patient had this dilator not been removed.

During another "rescue" four protestors staged an incident involving a physician in order to bring assault charges against him. On January 12, 1991 the physician drove into our parking lot and four protestors blocked his car doors. He rolled down the window and was told they would not let him exit. He attempted to leave the parking lot and two of them threw themselves on the hood of his car. They later claimed he had tried to run them over. Another protestor was conveniently standing by to videotape the whole incident. They took the videotape and harassed the District Attorney's office until the District Attorney agreed to take the case before a grand jury. Our physician, now deceased, had to deal with the stress of a grand jury investigation during a time when he was quite ill with cancer, all because of a charade by antiabortion activists. Ironically, it was the videotape by one protestor which proved to the grand jury that the physician had done nothing wrong, so the case went no further. Still, it caused serious stress and anxiety for the doctor, as well as for the clinic staff.

Saturdays at our clinic routinely involve picketing and other antiabortion activity, even when a "rescue" is not planned. Picketers regularly attempt to block patients from getting out of their cars and attempt to block their entrance to the clinic. They regularly attempt to block physicians from entering the clinic. They often play loud music or preach and shout so loudly it can be heard inside the surgery rooms. This sometimes goes on for hours. They verbally abuse staff entering or leaving the building. They often trespass and come inside the building to preach at or scream at patients. Frequently, we find their antiabortion literature in our bathrooms and waiting rooms so we know they come in at times when we do not even see them. We call the police all the time, but the protestors seem to play a real cat and mouse game with them. They always leave the property or stop their activity as soon as the police arrive. The police are unwilling to make arrests for any activity they do not personally see, so the antiabortionists get away with a lot.

Dr. Boyd has received numerous death threats over the years. Some have been placed, not mailed, in the mailbox at his home. He recently received a letter at his office that said:

> "Hey, a——h——— Boyd. Those babies didn't know when they where dying by your butcher knife. So now you will die by my gun in your head very very soon—and you won't know when—like the babies don't. Get ready your dead."

Bomb threats, harassing calls and hate mail are experienced here on at least a daily basis. Our employee parking lot is regularly strewn with nails. We are constantly getting flat tires even though we continually pick up the nails.

The climate in our country has somewhat condoned and has certainly not condemned these types of harassment. We need some assistance from the Federal Government in order to be able to go about our daily lives with less fear.

PLANNED PARENTHOOD of Rhode Island

111 Point Street Providence, Rhode Island 02903
401 421 9620 Clinic
401 421-7820 Administration and Education
401 453-3875 Fax

May 19, 1993

The Honorable Edward M. Kennedy, Chairman
Committee on Labor and Human Resources
United States Senate
Russell Senate Office Building
Room 315
Washington, D.C. 20510

Dear Senator Kennedy,

Planned Parenthood of Rhode Island is concerned that the Mayor of the City of Providence took such exception to Dr. Pablo Rodriguez's testimony before your Committee on May 12, 1993 that he felt it necessary to write all of its members.

We acknowledge Mayor Cianci and the Providence Police for what has been done to protect our clinic, but our patients and staff still feel threatened. The Mayor may not have sufficient resources or personnel to deal with this situation. This is a national problem requiring a national solution, and passage of this bill can only help. We strongly support the Freedom of Access to Clinic Entrances Act of 1993 because of our concern for the safety of our clients.

Dr. Rodriguez's testimony reflects the sentiments and position of this agency's Board of Directors, staff, and volunteers, and remains an accurate portrayal of our recent experiences as a woman's health care provider. Our primary purpose in testifying was to demonstrate our solid support for S-636 and to provide evidence as to the need for its passage.

There are several factual inaccuracies in Mayor Cianci's letter; an accurate account of the specifics referenced is included with this correspondence.

The Mayor's letter does not reference the day our clinic waiting room was invaded and no arrests were made, nor the time the clinic was blockaded for 20 minutes and no arrests were made. Neither does the Mayor's letter address the Board of Directors' concern regarding the manner in which protestors have been charged, as well as the minimal fines, with payment schedules, accepted by the City Solicitor's office for out of court settlement. The fact remains that the state's trespass laws have never been invoked at Planned Parenthood of Rhode Island's clinic.

Since Dr. Rodriguez's return from Washington, a post card campaign has been initiated against him. His neighbors have all been sent graphic and offensive cards stating he is responsible "for the deaths of over 2500 babies a year." The cards urge neighbors to call or write him at home to ask him to "quit and repent." His home address and phone number are listed on the card.

At its meeting today, the Board of Directors reaffirmed its admiration of and strong support for Dr. Rodriguez. We applaud his courage in appearing before your Committee and concur with the testimony he presented. Should you require any further clarification please contact our organization.

Sincerely,

The Board of Directors of Planned Parenthood of Rhode Island

PLANNED PARENTHOOD of Rhode Island

[illegible] Point Street Providence Rhode Island 02903
401 421 9620 Clinic
401 421 7820 Administration and Education
401 454 8874 Fax

Clarification of Information Reported by
Mayor Vincent A. Cianci, Jr.
in a Letter Dated May 17, 1993

1. The December 12, 1991 situation which actually occurred on December 21 involved a clinic blockade which kept the front doors closed for several hours. While the Providence Police did make every effort to assist, protestors were linked together by a metal pipe which they ultimately unlocked themselves. Those arrested were charged with failure to move.

2. The December 21, 1992 arrests which actually occurred on December 19, were made when the waiting room was invaded for a second time that month, and a number of individuals had to be carried from the reception area and foyer. Police did not proceed with removing demonstrators until the Executive Director drove to the clinic from her home to personally press charges. The clinic staff and patients felt trapped for the half an hour it took for the Executive Director to get to Providence. Again failure to move was the charge. Those arrested settled out of court in March for $50 fines to be paid over time as they did not have the money then.

3 The response to a call of dispersal on March 20, 1993 was in response to a blockade of the front door of the clinic. While the agency requested that arrests be made, no one involved was arrested, despite the fact that clinic doors were blocked for 20 minutes, and the next Saturday eleven were arrested for the same action.

4. The May 12, 1993 arrest of a protestor who allegedly assaulted Mr.Kilbane, was actually the arrest of a gynecological patient who had trouble making her way into the clinic as Mr. Kilbane video-taped her, verbally harassed her, and impeded her movement across the street. The patient was charged with assault, and will be arraigned in District Court next week, not the city's Municipal Court where clinic blockaders are sent.

5 The Providence Police have developed a Department procedure for handling large demonstrations. However new tactics are now being employed throughout the country, and this plan does not address these actions. Examples include clinic vandalism, small minute man blockades and invasions, and more personal attacks on patients and staff as in the "Nowhere to Hide Campaign."

May 17, 1993

The Honorable Edward M. Kennedy, Chairman
Committee on Labor and Human Resources
United States Senate
Senate Russell Building, Room 315
Washington. DC 20510

Dear Senator Kennedy:

When Dr. Pablo Rodriguez, medical director of Planned Parenthood of Rhode Island, testified on the floor of Congress on May 12 to support the "Freedom of Access to Clinic Entrances Act of 1993", he included in his testimony allegations that are, quite frankly, patently untrue. In referring to Pro-Life activists' attempts to deter women from entering Planned Parenthood's Providence clinic, where abortions take place, Dr. Rodriguez alleged that I had "...made no effort to bring an end to the escalating violence which now extends to Planned Parenthood's Executive Director, staff, volunteers and patients." He then went on to criticize the Providence Police Department for having never charged Pro-Life blockaders with trespassing, stating that they have rather invoked a city ordinance called "failure to move."

I am writing to set the record straight. I take great exception to Dr. Rodriguez's remarks about me and Providence's fine Police Department that is under the leadership of Colonel Bernard Gannon and Commissioner John Partington, two of the most outstanding and dedicated officers of the law in the entire United States. False statements, even those uttered before Congress, don't protect our citizens. However, the extraordinary professionalism and expertise of the members of our Providence Police Department do. Pro-Life activists would like us to have no police protecting Planned Parenthood while Pro-Choice activists would prefer a veritable army at the site. A delicate balance must be maintained. Activists are taken into custody when the situation warrants, as these examples illustrate.

- ***12/12/91*** — ***Eighteen Pro-Life activists arrested at Providence Planned Parenthood.***
- ***2/22/92*** — ***Protester arrested at site.***
- ***12/21/92*** — ***Eight protesters arrested at site.***
- ***3/20/93*** — ***In response to a call of a dispersal, six protesters were told to move on or face arrest. Although they moved, police left two on-post personnel with the two officers detailed there.***
- ***5/12/93*** — ***Providence Police arrested a protester who assaulted Pro-Life demonstrator Barry Kilbane.***
- ***5/12/93*** — ***Providence Police arrested Barry Kilbane for speaking to Planned Parenthood executive director Barbara Baldwin in violation of a restraining order issued against him.***

Following are just some of the methods that have been employed by the Police Department to ensure the safety of our city's Planned Parenthood building, their personnel, and their clients.

- *Members of the Providence Police Department's Intelligence Bureau regularly conduct surveillance of the Planned Parenthood Clinic in Providence and have been, for some time, collecting extensive intelligence on those individuals who repeatedly visit the site to protest or attempt to disrupt activities.*

- *More than one year ago, in direct response to protests at the Planned Parenthood Clinic, the Providence Police assembled a special Response Unit, trained to handle protests there.*

- *The Providence Police Department provides protection to Planned Parenthood's Executive Director, Barbara Baldwin, and follows her at certain times, even to her Providence residence. Our Police Department makes spot-checks of her home, inside and out.*

- *The Providence Police Department has a standing order to give special attention to the Planned Parenthood facility. When a special detail, hired by Planned Parenthood, is not at the site, the Department provides manpower at the site in a "Keep the Peace" capacity.*

- *The Providence Police Department protects the Planned Parenthood Clinic when it is closed. Several weeks ago, in fact, police officers called the executive director in the middle of the night because a door at the clinic was not properly secured.*

- *The Providence Police Department increases its surveillance of the Planned Parenthood Clinic at 4 a.m. on Saturdays and Sundays to ensure that activists don't chain themselves to the doors of the clinic or otherwise begin to mass at the site. Furthermore, a locksmith is on call 24 hours a day should this action occur.*

Additionally, the Providence Police Department has an excellent nine-page Operational Plan developed specifically for utilization "...in the event of a demonstration at one of the three abortion clinics..." in the city of Providence. It is a superb Department guide with detailed instructions on procedures to be implemented depending on the severity of activity. Since I believe that this Operational Plan could serve as a model for police departments throughout our nation, I have enclosed a copy herein. Police "reaction" is outlined in three phases, with Phase Three signifying the greatest intensity of activity. We are extremely well prepared in the city of Providence. However, due to the procedures previously stated--and others--we have, to date, prevented the occurrence of a confrontation necessitating the implementation of Phase Three policies.

Cognizant of the violence that has erupted at abortion clinics in nearby Boston and throughout our country and the recent murder of Dr. Gunn in Florida, we are especially vigilant at the present time. But however much I sympathize with Dr. Rodriguez's concerns for his family, our jurisdiction does not extend to Warwick, the city in which he resides. We have been in touch with the Warwick Police Department on this matter and are informed that he has filed just one complaint in all of the years that he has been performing abortions.

Before testifying before Congress, Dr. Rodriguez never mentioned to me that he felt that violence is escalating at the Planned Parenthood site nor did he express any displeasure with my actions or those of the Providence Police Department. As a matter of fact, I was a guest of his at a social occasion at his residence several weeks ago, and he never mentioned anything to me about his problems.

No one, in an attempt to get a bill passed, should use the national spotlight to make unfair and untrue allegations against public servants dedicated to preserving law and order, and especially about dedicated law enforcement officials of the caliber of Commissioner John Partington, former head of the Federal Witness Protection Program, and Colonel Bernard Gannon, a 36-year veteran of the Providence Police Department.

Due to our extraordinary concern for preserving public safety at the Planned Parenthood Clinic and the lengths to which we go to protect its facility, its personnel and its clients, I want the record to show how deeply disappointed Colonel Bernard Gannon of the Providence Police Department, Providence's Public Safety Commissioner John Partington, and I are by Dr. Rodriguez's untrue comments made during his Congressional testimony of May 12, 1993. I would be very happy to send Commissioner Partington and Colonel Gannon to Washington to testify before the Senate Labor and Human Resources Committee. I also request that, if possible, this letter be made part of the official record of the Committee's proceedings.

Sincerely,

Vincent A. Cianci

VINCENT A. CIANCI, JR.
Mayor of Providence

PROVIDENCE POLICE DEPARTMENT

Headquarters

To: Involved Commands

From: Colonel Bernard E. Gannon, Chief of Police

Subject: Department Procedure for handling large demonstrations

The following sets forth the operational plan which will be utilized in the event of a demonstration at one of the abortion clinics in this city. The operational plan is segmented into a number of Phases. Each phase indicates a higher degree of involvement and severity of the demonstration. All phases are intended to increase our reaction to the demonstration as required. Additionally, the use of the phase system will only provide that level of response as is necessary, and not cause an overreaction to the situation level.

Clinic Locations:

There are three (3) locations within the city of Providence where abortions are performed, and the operational hours for Saturday's:

1. Women's Surgical Services — Sat. 7:30 am. - 2:00 pm.
   386 Atwells Avenue
2. Planned Parenthood — Sat. 9:00 am. - 4:00 pm.
   111 Point Street
3. Women & Infants Hospital — CLOSED ON SATURDAY
   45 Gay Street

There is a fourth clinic which performs abortions, this is located in Cranston. The address for this location is

Women's Medical Center
1725 Broad Street, Cranston, R.I.

Phase One

Phase One will be initiated when, the officers which are short posted at either of the clinics detect any indication that a demonstration/sit-in is a possibility. The officer/s located at the potential demonstration site will call the Commanding Officer of the Patrol Bureau immediately when detecting activity and appraise him of the situation. The Commanding Officer will then respond to that location and utilize on-post personnel as needed to secure and contain the demonstration. If the situation is deemed secured and capable of being handled by the personnel available, then the Commanding Officer will call the Commanding Officer of the Uniformed Division and notify him of the situation and await further instructions. The Major will then either continue at this level of response or increase the response to the next phase as deemed necessary.

Therefore, phase-one indicates that:

1. The demonstration is peaceful and limited in scope.
2. That the current personnel available can contain the situation, without further assistance.
3. That arrests are either not anticipated or limited in scope.
4. That no other factors indicate an increase in activity.

Phase Two

Phase-two indicates that there is a large demonstration, that the situation is such that it is a potential problem and may not be capable of being handled by the current available personnel and that numerous arrests are a possiblity. Or that there is/are other factors which may cause the situation to intensify.

Under Phase-two the Colonel will be notified by the Major, and will then determine the level of response to the situation. At Phase Two, the Major will cause Captain LeBeouf to be notified to begin the call up of the Special Response Unit for utilization. The Special Response Unit will be under the direction of Captain LeBeouf and will be responsible for effecting arrests. The number of teams called will be determined on need basis and in direct proportion to the level of activity. Each team will consist of four officers and a sergeant will be responsible for the supervision of one or more teams. (A full listing of the duties, and responsibilities are outlined under team duties).

Additionally at Phase-two, the Major is authorized to keep officers on duty to meet the needs of the department or to call back officers as the situation dictates. Once the Colonel is on the scene, he will assume the duties of determining the level of response.

Also, the Major will make arrangements to assure that the Mobile Comamnd Vehicle is transported to the demonstration site and positioned to allow easy access; however in a location which affords a secure enviornment. When in Phase Two, the following will also be placed into action. Captain Dowd of the Prosecution Bureau will be called and notified of the situation, he will then cause members of his command to prepare to begin processing of potential arrestees. Captain Dowd will also be responsible for contacting other personnel, such as Municipal Court Judge/s, bail commissioners, etc. for speedy and efficient processing.

The Major will also have Lt. Downing of the B.C.I. notified and provisions made for the processing of prisioners at the station, additionally, B.C.I. will take a video camera to the scene for documentation of the activities and will have a B.C.I. officer at the scene to photograph prisioners with the arresting officer at the scene prior to transport to central station.

Captain Smith, will be notified and will act at the Press Information Officer. She will provide information to the press and act as the department liaison to the press. All information released will be made only through Capt. Smith or the Chief of Police. No officers will comment to the press without the expressed authorization of the Chief. The press will be allowed only into the front office of the Patrol Bureau and will not be allowed to enter the building without authorization from the Chief of Police.

During Phase Two, the on-duty Commanding Officer of the Patrol Bureau will make arrangement to secure the entire headquarters building. This entails, securing all doors, posting officers in vital locations and establishing patrols to assure the integrity of the building. Additionally, the Commanding Officer is to secure keys to police vehicles from all Bureaus and divisions within the department for utilization by members of the arrest teams and other units involved in the suppression of the demonstration. All vehicles will be removed from the two garages and all vehicles will be moved from the ramp of the station. An officer will be stationed at the garage door at the bottom of the ramp, to allow access to police vehicles transporting prisioners. Sufficient officers are to be utilized in the garage area, where prisioners will be held, to assure a secure enviornment.

Therefore Phase two indicates:

1. That the demonstration has become, or has the potential to increase in size or intensity.
2. That a number of arrests are a potential.
3. That containment may be beyond the scope of available personnel.
4. That extra steps are required to suppress the demonstration.

Phase Three

Phase Three is that the demonstration has intensified to such a level that additional off-duty personnel are called back to address the situation, that other departments are called upon for assistance.

This phase is to be totally determined by the Chief of Police after review of the situation and in the interest of public safety. The Major will make arrangements for emergency callup of off-duty personnel to assist with crowd control, traffic control, arrests, etc. Additionally, calls will be made to other departments for immediate assistance to contain the demonstration. At this point, it is assumed that all resources of this department are in place and outside assistance is required.

Therefore Phase three indicates:

1. A major demonstration in progress.
2. The situation is explosive and containment is questionable.
3. All resources of the department are activiated.
4. Outside assistance is required for containment.

This outlines the three operational phases which can be placed into operation to suppress and/or address a demonstration or major incident within this city. The following outlines the mechanics required and responsibilities to place the various phases into effect.

ARREST TEAMS:

_____: Commanding Officer

In view of the fact that there are two potential demonstration sites in the City of Providence, sufficient personnel is necessary in the event that there is an attempt to take over one or both locations.

In the event that Pro-life contingent attempts to close one or both of the clinic's within the city, the out-last personnel will hold their posts and appropriate contacts will be made. No arrests are to be made until the arrival of the Officer in Charge of this operation.

The arrest teams will consist of four officers per team with a sergeant in charge of one or more teams. The arrest teams sole responsibility will be to arrest individuals who are violating the law. Arrests will be made at the direction of their commanding officer.

The arrest team members will be dressed in the uniform of the day and carry only departmental issued or authorized side arms. No other special response equipment of uniforms will be worn or utilized.

The sergeants will be responsible for making arrangements to secure transportation for their assigned teams. Assistance will come from the Officer in Charge of the Patrol Bureau, who will have secured the keys to available departmental vehicles.

_____ Assistant Commanding Officer

Team - 1
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Team - 2
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Team - 3
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Sergeants:
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Sergeants:
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PROCESSING OF PRISONERS:

Lt. Edward Downing: Officer in Charge

Upon the arrest of an individual, two photos will be taken at the scene of the transport vehicle. The photo will include the arrested individual along with the Sergeant in charge of the Arrest Team. One photo is to be given to the Sergeant and the second photo will accompany the defendant to the station will be stapled to his/her warrant.

Each prisoner is to be fully printed at the station. In the event that a prisoner refuses to identify themselves, prints and photo will be taken and the individual will be assigned a number to future identification. Once an arrested person is fully processed, the individual will be brought to the Municipal Court for arraignment.

TRANSPORTING PRISONERS:

Major Uniformed Div. Officer in Charge

The Major will make arrangement with the Department of Corrections to utilize atruck or trucks for the movement of prisoners. The truck/s will be moved to the demonstration location when it has been determined that arrests are to be made.

HOLDING OF PRISONERS:

_____ Officer in Charge

The basement garages(Chief's and Detective sides) are to be cleared of all vehicles and this area will serve as holding a cell block area for prisoners that are brought to the Central Station. In addition, the ramp to the lower garage is to be clear of all vehicles.

The O. I. C. is to ensure that all doors are secure and that prisoners are not allowed into the area of the police officers lockers. Lt. Downing and members of the BCI will set up a processing camera and print table in the area of the door that leads up the back staircase for the lower garage.

All prisoners will be searched upon arrival to the cell block and trap bags are to be provided to secure any property of the prisioners. The procedure to accomplish these tasks will be handled by the O.I.C. of the station when ordered to do so by The Major.

Feeding of prisoners will be arranged via McDonalds and The O.I.C. of the building is to ensure that the feeding of prisoners is arranged via the Patrol Bureau.

Officers will need to be assigned to man the holding area and the appropriate number of officers will be made after a determination and evaluation has been made by the Major and the Chief of Police relative to the number of possible of arrests. Once the order has been given to arrest a large number of individuals, the building will be secured to limit access by all press and other persons into the building.

TRAFFIC CONTROL:

Major Uniformed Div. Officer in Charge

The Traffic Engineering Department is to be contacted and Emergency No Parking - Tow Zone signs are to be requested for the demonstartion site. Major Devine is to utilize two on officers to enforce the parking regulations.

MUNICIPAL COURT:

_____ Officer in Charge

The Prosecution Bureau is ensure that all paperwork is prepared to ensure that prisoners are arraigned in the most expedient manner possible. Personnel are to be called back to work if there is a sufficient number of arrests and additional personnel are required to handle the overload.

PRESS:

Captain Judith Smith Press Release Officer

Information for the press will be issued only by the Press Release Officer or the Chief of Police. All inquiries will be forwarded to one of these individuals. Officers are to be instructed to refrain from any comments and refer all questions to Captain Smith for response.

COMMUNICATIONS:

All officers involved in the detail will operate on Channel Three (3).

PERIMETER CONTROL:

All outside doors leading into the Central Station are to be secured. No one is to be allowed into the building unless they have specific business therein. Once a prisoner has been released, he/she is not to be allowed back into the station. Representatives of the press shall not be allowed beyond the front desk without permission from the Press Release Officer or the Office of the Chief.

SPECIAL CONSIDERATIONS:

In the event that there are a limited number of arrests, and if there are arrests made prior to the utilization of the on-scene processing, then the normal processing at the station until will be utilized until the on-site processing is enacted.

LOCK SMITH SERVICES:

In the event that demonstrators have locked themselves to certain areas of the building, or have locked themselves together, Mr. Jeff Owens of the Lock Shop is available for response to the location to assist with unlocking the demonstrators.

COORDINATION WITH OUT OF CITY POLICE:

The Major of the Uniformed Division is designated the officer in charge for contacting, directing and coordinating outside police departments who will be requested to respond to this City at our request. The outside (out of town) officers shall not make arrests in this City and shall be used for traffic and/or crowd control.

The following is a listing of important numbers which may be required in the event that this contingency plan is placed into effect:

Col. Bernard E. Gannon	884-5683 Car phone 523-1821 Home nights 884-1991
Major Domenic Baldassare	728-9767
Major William Devine	274-7788
Captain Paul LeBeouf	949-4355
Captain Judith Smith	949-4669
Lieutenant Edward Downing	272-0665
Lieutenant Richard Sullivan	272-7837
Patrolman Wayne Ferland	828-3285
Traffic Engineering Dept.	88-319
Munic. Court Judge	Prosecution will contact
Locksmith Jeff Owens	885-7878

The CHAIRMAN. The committee stands in recess.
[Whereupon, at 1:17 p.m., the committee was adjourned.]

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